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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IN RE STATE OF MISSOURI, ET AL.,
Petitioners,

v.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
AND THE
HONORABLE CHARLES W. BAKER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I

QUESTIONS PRESENTED

The issue presented herein concerns the question of whether the State of Missouri or the federal Bankruptcy Court for the Eastern District of Arkansas has jurisdiction over grain located in Missouri grain storage warehouses. Robert James, Don James, and G. E. James (the debtors), residents of Arkansas, operated public grain elevators in Missouri and Arkansas under various partnership identities, including elevators located at Holcomb, New Madrid (Rastine), Caruthersville, and Naylor, Missouri. An affiliated corporation, James Agri-Center, Inc., operates a public grain warehouse at Neelyville, Missouri.

On August 11, 1980, these debtors, including the corporation, filed bankruptcy proceedings in the Bankruptcy Court for the Eastern District of Arkansas. Three days prior to the filing of the bankruptcy proceedings, the debtors authorized the Missouri Department of Agriculture to assume control of the grain in their Missouri warehouses, pursuant to Missouri law, empowering the State to operate and liquidate insolvent grain warehouses. The Missouri Department of Agriculture filed receivership petitions for the debtors' grain warehouses, under Missouri law, in the state circuit courts for the counties in which the warehouses are located. On August 12, 1980, subsequent to the filing of the bankruptcy petitions, the Missouri courts appointed John G. Runyan, then director of the Department, as receiver of each warehouse. On August 29 the bankruptcy court entered an order directing the trustee to assume certain grain purchase contracts with the farmers, executed by the debtors prior to bankruptcy. On September 23, 1980, the trustee filed a request in Bankruptcy Court to sell the grain free and clear of all liens. In response to the petition to sell grain, the Missouri authorities brought an action in

Missouri state court against the trustee and debtors for enforcement of the Missouri Grain Laws.

The Missouri officials believed that the legal proceedings brought in state court under the Missouri Grain Laws, as an exercise of the state's police and regulatory power, fell within the exception to the automatic state provision of 11 USC § 362(b)(4). The Bankruptcy Court, the Eastern District of Arkansas, and the Eighth Circuit disagreed with Missouri's position. In its opinion of April 8, 1981, the Eighth Circuit found that the exception to the automatic state provision did not apply to the State of Missouri assuming control of the public grain warehouses in question, and thus the following question is presented to this Court:

1. If appropriate Missouri officials, pursuant to applicable state law, take possession of insolvent public grain warehouses in order to "make an audit and full investigation of the financial circumstances of [debtors] and carry out such operation or liquidation of said public grain warehouse[s] in order to protect the best interest of those individuals storing grain in said facilit[ies]," is such action of a sufficient "police and regulatory" nature to fit within the exception to the automatic state provision of 11 USC § 362(b)(4) so that the Arkansas Bankruptcy Court may not exercise exclusive control over said grain, which grain is, for the most part, not property owned by the debtor?

PARTIES

In the Eighth Circuit Court of Appeals the parties were:

The State of Missouri; John G. Runyan, [then] Director of the Missouri Department of Agriculture; John Ashcroft, Attorney General of the State of Missouri; and, James Boillot, Acting Director of the Missouri Department of Agriculture; all as appellants/petitioners.

The United States Bankruptcy Court for the Eastern District of Arkansas and the Honorable Charles W. Baker, as appellees/respondents; Robert P. Lindsey, Trustee, et al., as intervenor-appellees/intervenor-respondents; and, the United States of America, as intervenor.

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The State of Missouri, et al., petitioners herein, by Attorney General John Ashcroft, State of Missouri, respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on April 8, 1981; no motions for rehearing were filed.

REPORTS OF OPINIONS BELOW

On April 8, 1981, the United States Court of Appeals for the Eighth Circuit issued an Opinion vesting exclusive control of the grain at issue in the Arkansas Bankruptcy

Court. No motions for rehearing were filed. To the best of petitioners' knowledge the Eighth Circuit Opinion has not been published. Reproduction of that Opinion will be found at Appendix A.

On December 2, 1980, the United States District Court for the Eastern District of Arkansas issued an "Opinion and Order" denying the State of Missouri a writ of prohibition and concluding that the grain at issue stored in Missouri was within the exclusive jurisdiction of the Bankruptcy Court. To the best knowledge of petitioners' this "Opinion and Order" has not been published and will be found at Appendix B. It is this "Opinion and Order" which led to the Eighth Circuit Opinion of April 8, 1981, which petitioners' request this Court to review.

JURISDICTIONAL STATEMENT

Title 28 USC § 1254(1) states that cases in the courts of appeals may be reviewed by this Court:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

Title 28 USC § 2101(c) states that:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . .

Pursuant to this Court's Rule 20.6 petitioners have requested an additional six days in which to file their petition for writ of certiorari due to the unfamiliarity of the undersigned assistant attorney general with the instant case, and the printer's difficulty in having a printed copy of the petition completed and filed in this Court by July 7,

1981. As of the writing of this petition that motion for an extension of time has not been ruled upon.

Petitioners believe that this case involves a question of substantial federal law relating to the automatic state provision of the bankruptcy code, and exceptions thereto. Thus, petitioners believe that the Eighth Circuit's decision of April 8, 1981, is properly sought to be reviewed by a request of certiorari to that court.

STATUTORY PROVISIONS INVOLVED

Title 11 USC § 362, states, as applicable:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance of employment or process, of the judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(3) Any act to obtain possession of property of the estate or of property from the estate;

* * *

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

* * *

(4) Under subsection (a) (1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental units's police or regulatory power[.]

Section 411.519, RSMo 1978, states as follows:

411.519. Insufficient inventory, procedure to correct.—1. Whenever it appears to the satisfaction of the director that a licensed warehouseman does not have in his inventory sufficient grain to cover the outstanding receipts and scale tickets issued or assumed by him, or when the warehouseman refuses to submit his records or property to lawful examination, the director may give notice to the warehouseman to comply with any of the following requirements:

(1) Cover the shortage by supplying the grain or evidence of ownership of the grain;

(2) Give additional bond as required by the director;

(3) Submit to such examination as the director may deem necessary;

(4) Immediately purchase and make actual payment for a sufficient quantity and quality of grain to fully cover the shortage. If the warehouseman fails to comply with the requirements contained in the notice within twenty-four hours from the date of its issuance, or within such further time as the director may allow, the director may petition the circuit court of the county where the warehouse is located, as shown on the license application, for an order authorizing the director or his authorized agent to seize and take possession of any grain located in the warehouse of such warehouseman, and of all pertinent records and property.

2. Upon receipt of the director's verified petition setting forth the circumstances of the warehouseman's failure to comply with this chapter and further stating reasons why immediate possession by the director or his authorized agent is necessary for the protection of depositors, warehouse receipt holders or sureties, the court shall forthwith

issue an order authorizing the director or his authorized agent to take immediate possession for the purposes stated in this section. A copy of the petition and order shall be sent to the warehouseman.

3. At any time within ten days after the director or his authorized agent takes possession, the warehouseman may file with the court a response to the petition of the director stating reasons why the director or his authorized agent should not be allowed to retain possession. The court shall set the matter for hearing on a date not more than fifteen days from the date of the filing of the warehouseman's response. The order placing the director or his authorized agent in possession shall not be stayed nor set aside until such time as the court, after hearing, determines that possession should be restored to the warehouseman.

4. Upon taking possession, the director shall give written notice of his action to the surety on the bond of the warehouseman and may notify the holders of record, as shown by the warehouseman's records, of all receipts and tickets issued for grain to present their receipts or tickets for examination or to account for the same. The director may thereupon cause an audit and other investigation to be made of the affairs of the warehouse to determine the amount of the shortage and compute the shortage as to each depositor as shown by the warehouseman's records, if practicable. The director shall notify the warehouseman and the surety on his bond of the approximate amount of the shortage and may notify each depositor thereby affected by sending notice to the depositor's last known address as shown by the records of the warehouseman.

5. The director or his authorized agent shall retain possession obtained under this section until such time as the warehouseman or the surety on the bond shall have satisfied the claims of all depositors, or until such time as

the director or his authorized agent is ordered by the court to surrender possession. At no time while the director or his authorized agent is in possession of a warehouse, as authorized by this section, shall the director or his authorized agent operate, or be required to operate, the warehouse; nor will the director or his authorized agent be liable for any claims which have arisen or could arise from the non-operation of the warehouse.

6. If at any time, the director, whether or not he or his authorized agent has possession as authorized by this section, has evidence that a warehouseman is insolvent or is unable to satisfy the claims of all depositors, the director may petition the circuit court for the appointment of a receiver to operate or liquidate the business of the warehouseman in accordance with law.

7. All necessary expenses incurred by the director, his authorized agents or any receiver appointed under this section, in carrying out the provisions of this section may be recovered from the warehouseman in a separate civil action brought by the director in the circuit court or as part of the seizure or receivership action filed under this section. If the director or any of his authorized agents seize and take possession of the grain, records or property at the warehouse facility, the warehouseman shall be assessed and shall pay as part of the necessary expenses incurred a fee of fifty dollars per person for each day or part thereof that each such person performs such activities. The cost of liability insurance necessary to protect the director, the receiver and others engaged in carrying out the provisions of this section may be recovered as part of the necessary expenses. (L. 1977 S. B. 75 § 7)

STATEMENT OF THE CASE

This petition is brought as a result of the Eighth Circuit's determination that the exclusion to the automatic

state provision of the bankruptcy code, found at 11 USC § 362(b)(4), is not applicable to the attempt on the part of the State of Missouri to take possession of insolvent public grain warehouses within its jurisdiction, which grain in large part is not owned by the debtors. The Eighth Circuit found that this activity by the State of Missouri was not the type of "police or regulatory power" utilized by a governmental unit so as to except it from the automatic state provision of the Bankruptcy Code. The State of Missouri disagrees and states that its attempt to regulate insolvent public grain houses in the State of Missouri is exactly that type of "police or regulatory power" which is necessary to the health, welfare, and safety of its citizens and that the Eighth Circuit erred in not so concluding.

In this regard, the history of this case is as follows:

Chapters 411 and 276 of the Revised Statutes of Missouri ("Missouri Grain Laws") embody a comprehensive statutory program enacted by the Missouri legislature for the regulation of grain within this State.[1] The first regulatory grain law was enacted in 1889 and the most recent major revisions were adopted in 1965, 1977, and 1980. Chapter 411 comprehensively regulates all grain warehouses, public and private, located in the State of Missouri.

The Missouri grain laws were enacted under the police and regulatory powers of the State to protect the public from potential abuses inherent in the grain warehousing business. Historically, farmers have not had the resources for profitable on-site storage of grain. The tremendous

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[1]Chapter 411 (sections 411.010 to 411.785) contains the "Missouri grain warehouse law"; Chapter 276 (sections 276.401 to 276.561) contains the "grain dealers" section of the "stock yards, grain and produce exchanges" law. Chapter 411 deals primarily with grain storage transactions and the regulation of grain warehouses; Chapter 276 deals primarily with the qualification, licensure, bonding, and regulation of grain dealers.

volume of grain produced annually and the high cost of constructing and operating the facilities required to store grain prevent farmers from maintaining their own storage facilities. Instead, the public grain warehouse business developed and grain farmers have no practicable alternative to storing all of their grain in public warehouses.

The transaction between the farmer and the warehouseman is a bailment. The procedure to store grain is simple and routine: The farmer loads his truck with grain grown on his farm and transports it to the warehouse; at the warehouse, the farmer drives his truck onto a large scale (whose accuracy is regulated by state inspectors) and the weight of the truck, driver, and grain is recorded; the farmer then dumps his grain into a grain pit and immediately proceeds to the scales where the truck and driver are again weighed. A receipt is issued to the farmer for the difference between the recorded weights—the weight of the grain stored. Thus, the farmer delivers his grain to the warehouseman under a contract of bailment. The warehouseman-bailee gives the farmer-bailor a receipt evidencing the farmer's ownership of the grain. Under the contract of bailment, the bailee agrees to redeliver the bailed property to the bailor upon demand and in the same condition in which it was originally received. In return for fees paid by the farmer, it is the bailee's duty to protect the grain and provide whatever treatment is necessary to avoid deterioration so that the grain is redelivered upon demand in the same condition it was received. The bailor has the right to receive grain of the same quality and quantity as that delivered and the bailee-warehouseman is liable for any deficiency in quality or quantity.

Grain is perishable (subject to deterioration primarily by heat, humidity, and rodents) and fungible (one farmer's grain is indistinguishable when mixed with grain stored by other farmers).

Grain is a product of the farmer's labor which he can sell for immediate cash or use as a medium of investment. The purpose of the contract of bailment in lieu of an outright sale of the grain is to allow the farmer to defer selling his grain in anticipation of a rise in grain prices. By placing his grain in storage, the farmer retains ownership of the grain and therefore retains the right to determine *when* the grain is sold. Storing the grain under a contract of bailment also allows the farmer to borrow against the grain. The contract of bailment does not preclude the farmer from using his receipt as collateral. Borrowing funds against the grain allows the farmer to realize immediate cash and also retain ownership for investment purposes. Because the price of grain is usually depressed at the time of harvest, the farmer would often be unable to make any profit if he were unable to retain ownership of the grain until market prices adjust following harvest.

Therefore, because grain storage involves the two volatile economic characteristics of perishability and investment, the State of Missouri has undertaken to regulate every aspect of grain storage transactions.

Under Missouri grain laws, a public grain warehouseman: 1) must be licensed; 2) must be adequately bonded; 3) must provide a detailed monthly accounting of stored grain and receipts; 4) must file annual tariffs of receiving, storage, and delivery charges; 5) must issue only standardized, serialized receipts which are obtainable exclusively through state-authorized printers (every receipt must be accounted for before new receipts can be obtained); 6) must honor receipts upon demand; 7) must not issue receipts not supported by grain actually stored; 8) must redeliver stored grain of identical quality and quantity to the depositer; and, 9) is subject to criminal penalties for violation of the Missouri grain laws.

Prior to August 8, 1980, grain warehouses owned by Robert James, Don James, G. E. James, or entities controlled by them ("The James Brothers" or the "debtors") were licensed by the State of Missouri to operate at five separate locations in Southeast Missouri. As of that date, these warehouses had issued several hundred receipts to farmers who had deposited grain therein.

On August 8, 1980, the James Brothers voluntarily surrendered possession and control of the grain located in their warehouses in Missouri to the Department of Agriculture. The Department took control of each warehouse and immediately conducted an audit which showed that, except for insignificant discrepancies at two warehouses, enough grain was on hand at each of the warehouses to meet the obligations under the outstanding receipts.

On August 11, 1980, the James Brothers filed bankruptcy petitions in the United States Bankruptcy Court for the Eastern District of Arkansas.

On August 12, 1980,[2] in order to insure the proper operation of the warehouses in conformity with the Missouri grain laws, the Department of Agriculture filed separate receivership actions in the respective Missouri circuit courts for the counties where the grain warehouses were located; on that same date, each respective circuit court appointed the Director of the Department of Agriculture as the receiver of the grain located in those warehouses. Upon such appointment, the receiver immediately took possession of the warehouses.

On August 15, 1980, the bankruptcy court appointed

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[2]The petitions in the August 12, 1980, enforcement proceedings were prepared prior to the August 11, 1980, filings in the bankruptcy court. These petitions were filed without knowledge that the debtors had filed bankruptcy the preceding day.

Robert P. Lindsey, a resident of Arkansas, as bankruptcy trustee and authorized him to operate the grain warehouses and engage in a grain warehouse business at four of the warehouses located in Missouri.

On August 27, 1980, the trustee sought and obtained an order of the Bankruptcy Court authorizing him to compel specific performance of certain grain purchase agreements entered into by The James Brothers prior to bankruptcy. Under these contracts, farmers were required to deliver and sell to the trustee as-yet undelivered grain; the Bankruptcy Court also authorized the trustee to resell the grain so purchased. The trustee's admitted purpose was to reap substantial profits from these grain transactions.

The trustee's plan became immediately apparent. The holders of receipts to the grain became incensed upon realizing that the Bankruptcy Court and the trustee intended to compel specific performance of these purchase and sale contracts while, at the same time, they refused to honor valid receipts of stored grain. Some of the holders of receipts were required to sell additional grain to the trustee even though the trustee refused to honor receipts held by them.

On September 23, 1980, the trustee claimed ownership of *all* the grain in a pleading filed in the Bankruptcy Court. This was the first time the trustee had made such a claim and the Missouri authorities became greatly disturbed. In the same pleading the trustee sought approval from the Bankruptcy Court to sell *all* the grain on October 27, 1980. Attempts to sell the grain had been galling to some of the holders of receipts because the sale destroys a farmer's opportunity to realize profit upon sale in the grain market.

On October 20, 1980, the Missouri authorities filed a lawsuit in the Circuit Court of New Madrid County, Missouri, for the purpose of enforcing the Missouri grain laws.

This enforcement proceeding named the bankruptcy trustee and the debtors as defendants and sought the following relief: 1) immediate possession of the Missouri warehouses, including the grain and records contained therein; 2) authorization to protect and preserve the grain and the records; 3) an injunction "pending the final hearing and determination of this proceeding" restraining defendants from interfering with plaintiffs' enforcement of the Missouri grain laws and plaintiffs' prosecution of its enforcement proceedings; 4) a temporary restraining order restraining defendants from interfering with plaintiffs' enforcement of the Missouri grain laws and plaintiffs' prosecution of this enforcement proceeding; 5) an injunction enjoining the bankruptcy trustee from acting as a warehouseman or grain dealer in the State of Missouri without a license; 6) a prompt hearing on the injunctions and restraining order; and, 7) a prompt hearing on plaintiffs' right to possession of the grain. After an ex parte hearing, the Missouri circuit court issued a temporary restraining order.

Immediately upon returning to his office from the October 20, 1980, New Madrid proceedings, James F. Gunn, an attorney of counsel to the Missouri Attorney General in the enforcement proceedings, was advised by telephone by bankruptcy Judge Charles Baker that contempt proceedings would be held in Bankruptcy Court at 9:30 a.m. on the morning of October 22, 1980. Because of this telephone call, the Missouri authorities filed a petition for a writ of prohibition in the Eighth Circuit on October 21, 1980; on that same day, the Eighth Circuit denied the petition without prejudice to the refiling of the petition in the district court in Arkansas by October 30, 1980, and stayed the proceedings in the Bankruptcy Court pending the refiling of that petition.

On October 30, 1980, the Missouri authorities filed (Appendix C) a petition for writ of prohibition in the district court in Arkansas and, on December 2, 1980, District Court Judge Howard denied the writ with respect to prohibiting the bankruptcy judge from interfering with the Missouri enforcement proceeding. (Appendix B).

The Eighth Circuit opinion of April 8, 1981, as referred to previously, culminated from an appeal of the December 2, 1980, order of District Court Judge Howard consolidated with a second writ of prohibition filed by the Missouri authorities in the Eighth Circuit requesting that the bankruptcy proceedings be stayed. As pertinent to this petition the Eighth Circuit concluded that the Arkansas Bankruptcy Court had plenary control of the grain located in Missouri and that the judicial actions of the State of Missouri did not fall within the exception to the automatic state provision of the Bankruptcy Code because:

> Missouri's grain laws, although regulatory in nature, primarily relate to the protection of the pecuniary interest of the debtors' property and not to matters of public safety and health. Missouri's laws, by governing the operation and liquidation of grain and warehouses, directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the section 362(b)(4) exception.

THE REASONS FOR GRANTING THE WRIT

Petitioners submit that a writ of certiorari should issue because the Eighth Circuit's decision of April 8, 1981, decides an important question of federal law which has not been, but should be, settled by this Court, and has decided that question in a fashion which suggests that it may be in conflict with previous decisions of this Court.

Based upon the foregoing section petitioners posit that

their effort to act as receivers of the insolvent public grain warehouses of the James Brothers, located in Missouri, were within the exception of the automatic stay provision of the Bankruptcy Code. It is petitioners' position that their action pursuant to § 411.519, RSMo 1978, was for the public health, welfare, and safety of the Missouri citizenry. As noted, the Missouri grain laws strictly control and regulate all aspects thereof. These laws were passed in an effort to protect the farmers of this State, and farmers of other states storing grain in Missouri. These laws were not passed only to protect a portion of the citizenry, i.e. farmers, but were passed to protect the whole of Missouri citizenry against fradulent and disreptuable practices of grain warehousement. It is not only the farmers who need this protection, but all the citizenry of Missouri, so that grain grown in this State, and other states but stored here, is fairly and equitable dealt with and distributed in a manner which provides for the health, welfare, and safety of Missouri citizens, and others.

The foregoing discussions, in this and the previous section, indicate that Missouri's grain laws are "police and regulatory laws" within the meaning of the exception to the automatic bankruptcy stay provision. It has been conceded that the Missouri authorities have no pecuniary interest in the grain; rather, their sole interest in the grain at issue here is to protect Missouri farmers and Missouri citizens so that the farmers can produce and store their grain safety and equitably, and so that this grain can be readily and easily distributed to the people of this and other states. Without such regulations a disruption of some consequence to the grain market for farmers, and food market for consumers, is not beyond the realm of possibility.

Therefore, petitioners posit that the Eighth Circuit's conclusion that the Missouri authorities were exercising

only a pecuniary interest in the grain and not one relating to its "police and regulatory power" is erroneous.

Missouri's interest in this case goes far beyond the mere ambit of the instant grain situation; rather, the State of Missouri is concerned that the Eighth Circuit's very narrow definition of "police and regulatory powers" will prevent the State of Missouri, in the future, in substantially different situations, from adequately and effectively protecting its citizenry any time a petition in bankruptcy is filed. Indeed, the Eighth Circuit's narrow definition may have the following consequences; a city would no longer be able to require a land developer in reorganization to comply with the zoning laws; a state would no longer be able to require a liquor store owner in reorganization to comply with liquor control laws; and, the SEC would no longer be able to require a securities dealer in reorganization to comply with securities registration laws.

This Court has repeatedly held that a state statutory scheme regulating grain, grain transactions, grain dealers, grain warehouses and the grain warehouse industry in general is an exercise of the state's police and regulatory powers. *Munn* v. *Illinois*, 94 U.S. 113 (1876); *Budd* v. *New York*, 143 U.S. 517 (1892); *Brass* v. *North Dakota*, 153 U.S. 391 (1894). In each of these cases this Court upheld the power of state legislators to enact comprehensive regulatory schemes governing the grain industry. This Court in *Munn* specifically found that the grain industry had been "clothed" with the requisite "public interest" in order to render it regulable under a state's police and regulatory power:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which

> the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. . . .
>
> . . . [W]hen private property is devoted to a public use, it is subject to public regulation.
>
> . . . Certainly, if any business can be 'clothed with a public interest' . . . this has been. . . . [I]t is by the facts.
>
> . . . And it must be conceded that it is a business in which the whole public has a direct and positive interest"

Munn, supra, 94 U.S. at 126-133.

After finding regulation of the grain industry to be within the scope of the police and regulatory power of the state, this Court in *Munn* further held that the state would not be second-guessed with respect to the extent it exercised its police and regulatory power: "Of the propriety of the legislative interference within the scope of legislative power, the legislature is the exclusive judge." *Id.*, 94 U.S. at 132-133.

Enforcement of the Missouri grain laws is an exercise of the police and regulatory powers of the State of Missouri. Although this Court has spoken with respect to the statutory schemes of various states other than Missouri, the Missouri Supreme Court has concluded, citing *Munn* at authority, that the Missouri grain laws were enacted pursuant to the police and regulatory powers of the State of Missouri:

> "[T]he conduct of this business necessarily affected the public and made its regulation a proper exercise of the police power of the state. . . ."

State ex rel. Hubbard v. *Cochrane*, 175 S.W. 599, 601 (Mo. 1915).

The case law is unanimous; there is no authority for the proposition that the Missouri grain laws were not enacted pursuant to the State's police and regulatory powers. Therefore, enforcement of the Missouri grain laws fall squarely within the § 362(b)(4) exception to the Bankruptcy Court's jurisdiction.

Axiomatically, laws against stealing obviously "protect the pecuniary interests and property" of owners of that property, and no one would contend that laws against stealing are not an exercise of the police powers of the state. The decisive point is that neither the State of Missouri, its Department of Agriculture, nor its Attorney General, has any pecuniary interest in the grain or in the enforcement of its grain laws; none of them holds any document or title to any of the grain or derives money of any kind from exercising jurisdiction. To the contrary, enforcement of the Missouri grain laws is an expensive undertaking and such expense only emphasizes that this is an exercise of its police and regulatory powers. The Missouri authorities are obligated by the statutes to enforce the Missouri statutes; they stand to benefit only to the extent that the directives of the Missouri legislature are complied with and that public confidence will continue in the ability of Missouri to enforce its laws.

Enforcement by the State of Missouri pursuant to its police and regulatory laws is a power within the exclusive domain of sate authorities and the state courts. Congress deemed it better to allow the states to enforce their own regulatory laws because the states and their agencies would likely be more expert and knowledgeable and more sensitive to local conditions.

In *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939), this Court expressly held that a Bankruptcy Court had no power to interfer with a debtor railroad's regulatory re-

lationship with the state. This Court found that congress never intended to give Bankruptcy Courts or trustees the power to regulate in the public interest and held that state regulation in the public interest was entrusted exclusively to state administrative agencies. In *Palmer*, proceedings were pending before a Massachusetts state agency charged with the regulation of railroads. In the proceedings, permission was sought to have the bankruptcy trustee abandon the responsibility to service various railroad stations serviced by the railroad prior to bankruptcy. The Bankruptcy Court authorized the abandonment, but this Court reversed the holding stating that the Bankruptcy Court was powerless to enfringe upon responsibilities entrusted exclusively to the state and its agencies. Mr. Justice Frankfurter stated at 208 U.S. at 86:

> "But the [bankruptcy] court claimed power over the carrier's relation to the state. It has become the settled social policy both of the states and the nation to entrust the type of public interest here in question to expert administrative agencies because of 'the notion', as Judge Learned Hand pointed out below 'that a judge is not qualified for such duties.' "

It was argued in *Palmer* that enforcement of state regulatory powers over the railroad and reorganization would impair the ability of the railroad to effectively reorganize. This Court rejected that argument ruling that state law should be followed without regard to its effect upon reorganization.

The *Palmer* Court cautioned that time delays resulting from fully complying with state laws or the financial loses which may result from such compliance may "easily be exaggerated." The Court went on to downplay such complaints when it stated at page 39:

> "Perhaps it is no less true that amenability to state

laws will serve as an incentive to the formulation of reorganization plans. . . ."

The State of Missouri has a duty to protect the public from all form of improper management of grain warehouses, including fraud and abuse by their operators. In order to accomplish this goal of protecting the public, the state enacted comprehensive legislation—the Missouri grain laws—which require licensing of grain dealers and grain warehousemen, and provides for detailed regulation of the grain busines. The Missouri grain laws give the Missouri authorities the right to take possession of warehouses and appoint a receiver to assume their operation in the public interest. Section 411.519, RSMo 1978. Rehabilitation of debtors in bankruptcy does not trigger a moratorium on the enforcement and applicability of police power enactments of the State of Missouri.

This Court and the Missouri Supreme Court have determined that the enforcement of grain laws is a valid exercise of a state's police and regulatory powers. Section 362(b)(4) of the Bankruptcy Code permits enforcements initiated by state regulatory authorities to continue even though a bankruptcy petition has been filed. The case law is overwhelming that Bankruptcy Courts do not have subject matter jurisdiction to enjoin enforcement proceedings initiated by state regulatory authorities. The Arkansas Bankruptcy Court is attempting to enjoin Missouri's enforcement of its grain laws. Nevertheless, bankruptcy is powerless to thwart the Missouri circuit court's exclusive jurisdiction over such enforcement proceedings. The October 20, 1980, lawsuit now pending in the Circuit Court of New Madrid County should continue.

CONCLUSION

The State of Missouri, et al., petitioners herein, respectfully request, based upon all the foregoing, that this Court issue a writ of certiorari to the Eighth Circuit and after briefing and oral argument reverse that court's decision to the extent that it holds Missouri grain laws and their enforcement by Missouri authorities do not fall within the exception to the automatic stay provision of the Bankruptcy Code.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In Re: State of Missouri; State of Missouri Ex Rel John G. Runyan, as Director of the Missouri Department of Agriculture; State of Missouri Ex Rel Missouri Department of Agriculture; John G. Runyan, as Receiver of Certain Grain Warehouses; State of Missouri Ex Rel John Ashcroft, Attorney General of the State of Missouri; and James Boillot, Acting Director of the Missouri Department of Agriculture,

Appellants,

v.

U.S. Bankruptcy Court for the E.D. of Arkansas and the Hon. Charles W. Baker,

Appellees,

and

Robert P. Lindsey, as Trustee, et al.,

Intervenor-Appellees,

and

United States of America,

Intervenor.

No. 80-2179

Appeal from the United States District Court for the Eastern District of Arkansas.

In Re: State of Missouri; State of Missouri Ex Rel John G. Runyan, as Director of the Missouri Department of Agriculture; State of Missouri Ex Rel Missouri Department of Agriculture; John G. Runyan, as Receiver of Certain Grain Warehouses; State of Missouri Ex Rel John Ashcroft, Attorney General of the State of Missouri; and James Boillot, Acting Director of the Missouri Department of Agriculture,

Petitioners,

v.

U.S. Bankruptcy Court for the E.D. of Arkansas and the Hon. Charles W. Baker,

Respondents,

and

Robert P. Lindsey, as Trustee, et al.,

Intervenor-Respondents,

and

United States of America,

Intervenor.

No. 80-2198

On Petition for Writ of Prohibition

Submitted: March 11, 1981

Filed: April 8, 1981

Before BRIGHT, HENLEY, and McMILLIAN, Circuit Judges.

BRIGHT, Circuit Judge.

This case presents the question of whether the State of Missouri or the federal bankruptcy court for the Eastern District of Missouri has jurisdiction over grain located in Missouri grain storage warehouses. The bankruptcy court[1] asserts that it has exclusive jurisdiction over the grain warehouses pursuant to a bankruptcy proceeding instituted by Arkansas debtors, operators of warehouses in Missouri and Arkansas. The State of Missouri[2] asserts that the grain should be liquidated in accordance with provisions of the Missouri Code, under the aegis of the Missouri Department of Agriculture.

The State of Missouri applies here for a writ of prohibition[3] to prevent the bankruptcy court from exercising

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[1]The bankruptcy judge, the Hon. Charles W. Baker, although named as a party, has elected not to appear in these proceedings. Robert P. Lindsey, bankruptcy trustee, has intervened on behalf of the bankruptcy court in support of the court's position. Forty-five farmers who claim an interest in grain stored in Arkansas have also intervened on behalf of the trustee.

[2]The Missouri parties are the State of Missouri; the State of Missouri ex rel. James Boillot, Acting Director of the Missouri Department of Agriculture; John G. Runyan, receiver of certain grain warehouses; and State of Missouri ex rel. Attorney General of the State of Missouri. A group of farmers claiming an interest in grain stored in Missouri has filed an amicus curiae brief on behalf of Missouri.

[3]A writ of prohibition affords an expeditious and effective means of confining an inferior court to a lawful exercise of its prescribed jurisdiction or compelling a court to exercise its authority. *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). In this case, however, the parties delayed consideration of the writ by advising the court of an imminent settlement of the dispute, which the parties failed to achieve.

jurisdiction over the grain. The State also appeals from the district court's[4] denial of its application for a similar writ of prohibition. *See In re Cox Cotton Co.*, 3 C.B.C.2d (Collier's Bankruptcy Cases) 615 (E.D. Ark. 1980).

After carefully reviewing the record and the contentions of the various parties, we sustain the authority of the bankruptcy judge. We hold that the Bankruptcy Reform Act of 1978 (the Code), 11 U.S.C. § 101 *et seq.* (Supp. III 1979), vests the bankruptcy court with exclusive jurisdiction over the grain and grain warehouses in question, subject, of course, to the court's and trustee's obligation to protect the interests of farmers and others who have ownership rights in the grain. *See* 11 U.S.C. § 361. Accordingly, we deny the writ of prohibition and affirm the order of the district court.

I. Background.[5]

Robert James, Don James, and G. E. James (the debtors), residents of Arkansas, operated public grain elevators in Missouri and Arkansas under various partnership identities, including elevators located at Holcomb, New Madrid (Ristine), Caruthersville, and Naylor, Missouri. An affiliated corporation, James Agri-Center, Inc., operates a public gain warehouse at Neelyville, Missouri.

On August 11, 1980, these debtors, including the corporation, filed bankruptcy proceedings in the bankruptcy court for the Eastern District of Arkansas. The partnership liquidations were originally filed under chapter 7 of the Bankruptcy Code, and subsequently were converted into reorganization proceedings under chapter 11 of the Code.

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[4]The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

[5]We note that no adversary factual record has been made in these proceedings. Our determination rests upon the various pleadings, affidavits, and representations in the briefs.

The corporation operates as a debtor in possession under chapter 11 of the Code. The bankruptcy court appointed Robert P. Lindsey initially as the interim trustee on August 15, 1980, and later as permanent trustee for the purpose of operating and liquidating the various partnerships.

Three days prior to the filing of the bankruptcy proceedings, the debtors authorized the Missouri Department of Agriculture to assume control of the grain in their Missouri warehouses, pursuant to Missouri law empowering the State to operate and liquidate insolvent grain warehouses.[6] The Missouri Department of Agriculture filed receivership petitions for the debtors' grain warehouses in the state circuit courts for the counties in which the warehouses are located. On August 12, 1980, subsequent to the filing of the bankruptcy petitions, the Missouri courts appointed John G. Runyan, then Director of the Department, as receiver of each warehouse and ordered him to

> make an audit and full investigation of the financial circumstances of respondents [debtors] and carry out such operation or liquidation of said public grain warehouse[s] in order to protect the best interests of those individuals storing grain in said facilit[ies].

On August 29, the bankruptcy court entered an order directing the trustee to assume certain grain purchase con-

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[6]The applicable laws are the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 to § 411.765 (1979 & Supp. 1980), and the Stockyards, Grain and Produce Exchange Law, Grain Dealers Section, Mo. Rev. Stat. § 276.401 to § 276.581 (Supp. 1980). Chapter 411 deals primarily with grain storage transactions and the regulation of grain warehouses. The law requires state licensing of anyone who operates a warehouse, Mo. Rev. Stat. § 411.255; authorizes the Director of the Department of Agriculture to act as receiver to operate or liquidate a warehouse with insufficient inventory, Mo. Rev. Stat. § 411.519; and incorporates article 7 of the Uniform Commercial Code, Mo. Rev. Stat. § 411.020. Chapter 276 deals with the qualifications, licensing, bonding, and regulation of grain dealers.

tracts with farmers, executed by the debtors prior to bankruptcy. A number of farmers, believing this action deprived them of their rightful possession of their grain, barricaded the New Madrid (Ristine) grain warehouse. The bankruptcy court ordered United States Marshals to intercede and break the blockade.[7]

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[7]Petitioners recite the following version of these events:

About two weeks after the bankruptcy cases were commenced, the bankruptcy trustee obtained an order dated August 27, 1980 from the bankruptcy court authorizing him to operate the business of the partnership Debtors, which included a right on his part to perform grain purchase agreements that the Debtors had made with the farmers and a further right to re-sell the grain he would so purchase to three purchasers pursuant to certain contracts of purchase and sale, involving large quantities of grain; the trustee's expressed purpose was to reap substantial profits. The trustee's plan, of course, became known to the public, and the farmer-receipt-holders became incensed when, although grain would be leaving the warehouses to enable the trustee to perform these purchase and sale contracts, the farmer-depositors were told that they could not get possession of their grain. Some of the farmer-sellers were even being required to sell additional grain to the trustee who would not release their stored grain to them.

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Because of the intolerable situation created by their inability to get possession of their own property, the farmer-depositors either took possession of, or barricaded others from entering, the New Madrid (Ristine) grain warehouse of which the defendant Lindsey was and is trustee. The bankruptcy trustee responded with an application to the bankruptcy court asserting, with inflammatory charges, that these Missouri farmer-depositors were guilty of unlawful possession, criminal trespass and blockade. The bankruptcy court granted an order dated September 15, 1980, effective as of September 11, 1980, ordering that the United States Marshal for the Eastern District of Arkansas and the United States Marshal for the Eastern District of Missouri remove all persons blockading the facilities and directing that the marshals arrest and bring before the bankruptcy court any persons found to be blockading or barricading the facilities or interfering with the trustee's "capacity to operate the debotor's business". United States Marshals appeared at the premises in force, and the farmers reluctantly went home.

On September 3, 1980, the State requested that the bankruptcy court determine the ownership of the grain located in the Missouri partnership warehouses. The State subsequently voluntarily withdrew the request; thus the question of the ownership of the grain remains in dispute. Missouri concedes that the debtors own at least 2.3 percent of the grain. Other parties claiming ownership of the grain include Missouri and Arkansas farmer-producers, the Commodity Credit Corporation, and the First Tennessee Bank, N.A., Memphis. The State and the trustee dispute whether the amount of grain on hand exceeds the outstanding warehouse receipts. The trustee estimates the value of the Missouri grain at approximately $5,000,000.

On September 11, 1980, the bankruptcy court issued an order approving the trustee's application for a grain dealer and warehouse operator's license. The court also fixed the trustee's bond at $1,000,000 and ordered the trustee to comply to the extent possible with Missouri laws and regulations concerning the licensing of grain dealers and warehouses.

The drama escalated when, on September 23, 1980, the trustee filed a request in bankruptcy court to sell the grain free and clear of all liens. The trustee alleged that the grain should be sold because of the cost of storage, the high market price, the danger of deterioration, and the financial benefits of investing the proceedings pending eventual distribution. The trustee asserted authority to sell the grain pursuant to 11 U.S.C. § 363(f)(4), which permits the sale of property owned by an entity other than the bankruptcy estate if the ownership is in bona fide dispute.[8] Here, the trustee alleged a genuine dispute between the estate and other parties concerning ownership of the grain.

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[8]At the same time the trustee filed 14 additional adversary proceedings seeking specific performance of unfulfilled grain contracts in Arkansas and Missouri.

In response to the petition to sell grain, the Missouri authorities brought an action in Missouri state court against the trustee and the debtors for enforcement of the Missouri grain laws. On October 20, 1980, the state court issued a temporary restraining order, coupled with an order to show cause, directing Missouri's Director of Agriculture to take possession of the grain warehouses and restraining the trustee from interfering in any way with the Director's control, operation, and liquidation of the Missouri grain.

Needless to say, the order produced an immediate response from the trustee and the bankruptcy court. On the same day the state order issued, the bankruptcy judge telephoned counsel for Missouri's Director of Agriculture and advised him that contempt proceedings would be heard against the Director.

The Missouri officials immediately sought a writ of prohibition in this court. We denied that petition on October 21, 1980, without prejudice to the filing of a petition for such a writ in the district court for the Eastern District of Arkansas. We also stayed certain bankruptcy proceedings, including the contempt proceeding, pending a further order of this court. The Missouri officials then unsuccessfully sought prohibitory relief in the federal district court. *See In Re Cox Cotton Co.*, 3 C.B.C.2d 615 (E.D. Ark. 1980).

The district court ruled that the bankruptcy court possessed exclusive jurisdiction over the estate of the debtors, which included all legal and equitable interests in property of the debtors wherever located as of the commencement of the action. *See* 11 U.S.C. § 541(a); 28 U.S.C. § 1471(e) (Supp. II 1978). The court also observed that, although state law defines the "interests" in property, federal law controls the issue of whether property, as so defined, becomes property of the debtor's estate. The court recognized that competing claims against the property

existed, and, therefore, the bankruptcy court had jurisdiction at least to determine whether the grain is part of the estate as defined by the Code. *In Re Cox Cotton Co., supra,* 3 C.B.C.2d at 623-24.

Missouri also argued that the legal proceedings brought in state court under the Missouri grain laws, as an exercise of the state's police and regulatory power, fall within the exception to the automatic stay provision of the Code, 11 U.S.C. § 362(b)(4).[9]

The district court rejected this contention, concluding that:

> It is plain Petitioners are not endeavoring to prevent a violation of consumer protection, environmental protection, fraud or a similar police or regulatory law involving the safety, health, morals and the general welfare of society, but on the contrary, Petitioners' sole objective is to protect the pecuniary interests in

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[9]Section 362, as applicable, provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of–
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> (1) the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> • • • •
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> (3) any act to obtain possession of property of the estate or of property from the estate;
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> • • • •
>
> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay–
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> • • • •
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power[.]

property of purported depositors. Consequently, Petitioners' action does not fall within the exception to the jurisdiction of the Bankruptcy Court where a governmental unit is enforcing a police or regulatory power. [*In Re Cox Cotton Co., supra,* 3 C.B.C.2d at 624.][10]

The State of Missouri appeals from the district court order and renews its mtoion for a writ of prohibition in this court, contending that

1) the bankruptcy court has no subject matter jurisdiction over the grain located in the debtors' grain warehouses because under Missouri law that grain was not the property of the warehouse owners;

2) the bankruptcy petitions did not automatically stay the Missouri state court proceedings because those proceedings related to governmental enforcement of its police or regulatory power; and

3) the bankruptcy trustee, under federal law, must comply with Missouri grain laws and, therefore, the bankruptcy court has acted beyond its jurisdiction in authorizing the trustee to perform certain functions without a Missouri license.

We affirm the district court and deny the petition for a writ of prohibition.[11]

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[10]The district court also found that to the extent Missouri's Warehouse Grain Act is inconsistent with the provision of the Bankruptcy Code, the law is invalid under the supremacy clause. *See Perez* v. *Campbell,* 402 U.S. 637 (1971).

[11]We also note that during the pendency of this appeal, certain farmers removed approximately 31,000 bushels of soybeans from the Ristine elevator. This grain has now been redeposited in the Missouri Farmers Association, Inc., storage facility at Bernie, Missouri.

II. Discussion.

A. *Jurisdiction.*

As of the commencement of the bankruptcy actions on August 11, 1980, the bankruptcy court acquired "exclusive jurisdiction of all the property, wherever located, of the debtor[.]" 28 U.S.C. § 1471(e). Section 541 of the Code, 11 U.S.C. § 541, establishes that the filing of the bankruptcy petitions creates an estate and defines which property comprises the estate. As explained in the historical and advisory notes to 11 U.S.C. § 541,

> [u]nder paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. * * * *The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or leasehold interest, for example.* [H.R. Rep. No. 595, 95th Cong., 1st Sess. 367 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6323; S. Rep. No. 989, 95th Cong., 2d Sess. 82, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5787, 5868 (emphasis added).]

To determine whether the bankruptcy court has jurisdiction over the Missouri grain, therefore, we must decide if the debtors' interest in the Missouri grain falls within section 541's broad definition of property.

The trustee relies on the debtors' possessory interest as of the commencement of the action to argue that the Missouri grain constitutes property of the estate. The trustee also asserts that the estate holds a lien against the grain for ongoing storage charges and owns outright some of the grain, claiming that commercial documents indicate a sale to the debtors, rather than a bailment between the farmers and the warehouses. The trustee, however, has

presented no documents of title to substantiate his claim of ownership. Before the district court, the State conceded that the debtors own 2.3 percent of the grain in dispute.

On the record before us, the debtors' interest in the Missouri grain consists of possession[12] and a minute ownership interest. In light of the broad definition of property under section 541 of the Code, these interests in the grain are sufficient to trigger preliminary jurisdiction over the property in the bankruptcy court. 4 *Collier on Bankruptcy* ¶ 541.08[2] (15th ed. 1979); *see In re Farmers Grain Exchange, Inc.*, 1 Bankr. Ct. Dec. 1621 (W.D. Wis. 1975). Of course, the bankruptcy court must make the final determination of property interests after full presentation of the evidence.

Although we hold that the bankruptcy court has preliminary jurisdiction over the property, we emphasize that the bankruptcy court must administer the debtors' limited interest consistent with the ownership rights of holders of documents of title under Missouri law or, in the case of Arkansas grain, under Arkansas law.[13] *See In re Clemens*, 472 F.2d 939, 942 (6th Cir. 1972); *In re Universal Medical Services, Inc.*, 460 F.2d 524, 526 (3d Cir. 1972); *In re Farmers Grain Exchange, Inc., supra*, 1 Bankr. Ct. Dec. at 1622.

B. *Automatic Stay of State Court Proceedings.*

We next examine Missouri's contention that a writ of prohibition should issue based on the "police or regulatory

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[12]Since the debtors filed bankruptcy petitions prior to any state court order interfering with the debtors' right to possession, the debtors, rather than Missouri as receiver, had a possessory interest in the grain as of the commencement of the proceedings in bankruptcy.

[13]As explained by the Attorney General of Missouri, Missouri law provides that fungible goods, such as grain, once commingled, are deemed owned in common by all those entitled to a portion of the goods, which would include holders of warehouse receipts. *See* Mo. Rev. Stat. §§ 400.7-207 and 400.403 (1965).

power" exception to the automatic stay provision of the Bankruptcy Code. Section 362 provides that upon the filing of a bankruptcy petition, all judicial and other proceedings are stayed. This section also lists certain exceptions to the automatic stay, including section 362(b)(4), which provides:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
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> * * * *
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power[.]

Missouri asserts that this exception applies to the enforcement of its grain regulatory laws, and, therefore (1) the automatic stay provisions do not bar the Missouri state court proceedings; and (2) the bankruptcy court lacks the power to prevent Missouri from enforcing its grain laws by taking possession of the debtors' Missouri warehouses. Missouri essentially argues:

> [T]he enforcement of grain laws is a valid exercise of a state's police and regulatory powers. Section 362(b)(4) of the Bankruptcy Code permits enforcement proceedings initiated by state regulatory authorities to continue even though a bankruptcy petition has been filed. The case law is overwhelming that bankruptcy courts do not have *subject matter jurisdiction* to enjoin enforcement proceedings initiated by state regulatory authorities. The Bankruptcy Court here is attempting to enjoin Missouri's enforcement of its grain laws. The Bankruptcy Court is powerless to thwart the Circuit Court's exclusive jurisdiction over such enforcement proceedings. The October 20, 1980

lawsuit now pending in the Circuit Court of New Madrid County should continue. [Appellant's Brief at 32.]

We reject these contentions.

The present stay provisions amplify and clarify provisions of the former bankruptcy law and bankruptcy rules providing for an automatic stay of certain proceedings against debtors. *See, e.g.*, 11 U.S.C. § 148 (repealed 1978); 11 U.S.C. § 428 (repealed 1978); Rules of Bankruptcy Procedure 401, 601, 10-601, 11-44, 12-43 and 13-401. These automatic stays did not apply generally to proceedings affecting the public health and safety or certain governmental regulatory activity. *See In re Shippers Interstate Service, Inc.*, 618 F.2d 9 (7th Cir. 1980) (labor laws); *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248 (9th Cir. 1979) (labor laws); *In re National Hospital and Institutional Builders Co.*, No. 80 Civ. 6073 (S.D.N.Y. Feb. 25, 1981) (zoning laws); *In re Grand Spaulding Dodge, Inc.*, No. 79-C-1416 (N.D. Ill. June 9, 1980) (consumer protection laws); *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D. Puerto Rico 1979) (environmental protection laws); *In re Colonial Tavern, Inc.*, 420 F. Supp. 44 (D. Mass. 1976) (liquor laws).

In explaining the section 362(b)(4) exception, the Congressional House Report comments:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit

> the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors. [H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6299.]

Additionally, Congressman Don Edwards, Chairman of a subcommittee of the Judiciary Committee considering the Bankruptcy Code, observed:

> This section [362(b)(4)] is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate. [124 Cong. Record H 11089, *reprinted in* [1978] U.S. Code Cong. & Ad. News 6436, 6444-6445.]

In light of the legislative history and court decisions under the earlier bankruptcy act, we believe that the term "police or regulatory power" refers to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court. The pertinent provision of Missouri law relied on by the State, which concerns insolvency of grain warehouses, provides:

> If at any time, the director, whether or not he or his authorized agent has possession as authorized by this section, has evidence that a warehouseman is insolvent or is unable to satisfy the claims of all depositors, the director may petition the circuit court for the

> appointment of a receiver *to operate or liquidate* the business of the warehouseman in accordance with law. [Mo.Rev.Stat. § 411.519.6 (1979) (emphasis added).]

We conclude that Missouri's grain laws, although regulatory in nature, primarily relate to the protection of the pecuniary interest in the debtors' property and not to matters of public safety and health. Missouri's laws, by governing the operation and liquidation of grain warehouses, directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the section 362(b)(4) exception.

Alternatively, even if Missouri's liquidation proceedings come within the exception, the State's attempted enforcement of its insolvency laws does not oust the bankruptcy court of jurisdiction.

It is well settled that a bankruptcy action preempts state insolvency proceedings. "The bankruptcy law is paramount, and the jurisdiction of the Federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." *In re Watts and Sachs*, 190 U.S. 1, 27 (1903). *Accord, Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 737-38 (1931). The bankruptcy court could take appropriate steps to protect its jurisdiction over the estate, regardless of whether a proceeding falls within the section 362(b)(4) exception. For example, the court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[14] 11 U.S.C. § 105(a).

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[14]According to the historical and revision notes to section 363(b),

> [t]he effect of an exception is not to make the action immune from injunction.
>
> The court has ample other powers to stay actions not cov-

(Continued on next page)

Thus, even if the automatic stay provisions did not apply to the Missouri proceedings, the bankruptcy court possesses power in its discretion to enjoin state courts,[15] officials, and agencies from interfering with assets in custody of the bankruptcy court. *See In re Shippers Interstate Service, Inc., supra,* 618 F.2d at 13; *In re Bel Air Chateau Hospital, Inc., supra,* 611 F.2d at 1251; *In re W. F. Hurley, Inc.,* 553 F.2d 1096, 1101 (8th Cir. 1977); *In re Saugus General Hospital, Inc.,* 19 C.B.C. 651 (D. Mass. 1978) (bankruptcy court may enjoin action by state regulatory agency even when the state action is not automatically stayed by section 362(b)(4); 2 *Collier on Bankruptcy* ¶ 105.02 (15th ed. 1979). In other words, the exception of 11 U.S.C. § 362(b)(4), even if applicable in this case, in no way deprives the bankruptcy court of jurisdiction over assets of the bankrupt's estate, and therefore, section 362(b)(4) cannot serve as a basis for issuing a writ of prohibition.

Footnote continued

ered by the automatic stay. Section 105, of proposed title 11 * * * grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The bankruptcy courts are brought within the scope of the All Writs Statute, 28 U.S.C. § 1651 (1970), and are given the powers of a court of law, equity, and admiralty * * *. Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. [H.R. Rep. 595, 95th Cong., 1st Sess. 342 (1977) *reprinted in* [1978] U.S. Code & Cong. News 5963, 6298; S. Rep. No. 989, 95th Cong., 2d Sess. 51, *reprinted in* [1978] U.S. Code & Cong. News 5787, 5837.]

[15] This section [§ 105] is also an authorization, as required under 28 U.S.C. 2283, for a court of the United States to stay the action of a State court. As such, *Toucey* v. *New York Life Insurance Company,* 314 U.S. 118 (1941), is overruled. [H.R. Rep. 595, 95th Cong., 1st Sess. 317 (1977), *reprinted in* [1978] U.S. Code & Cong. News 5963, 6274.]

C. *Licensing.*

Missouri contends that the trustee intends to operate the Missouri grain warehouses without a state license,[16] in violation of 28 U.S.C. § 959 (b)(Supp. II 1978), which provides:

> (b) * * * [A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

We need not, however, decide this issue in the present proceeding. Inasmuch as we hold that the bankruptcy court possesses jurisdiction over the grain and the grain warehouses in Missouri, any complaint by Missouri regarding licensing may be presented to the bankruptcy court. Because this particular challenge does not in any way question the bankruptcy court's jurisdiction, it provides no basis for issuing a writ of prohibition.[17]

In addition, we note that the bankruptcy court has recognized that the trustee should operate the warehouse in accordance with state law. In its order granting the interim trustee's application for approval of a grain dealer and warehouse operator's license, the court found that

> there are certain statutory provisions and regulations

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[16]The trustee asserts that he has been unsuccessful in obtaining a license due to uncooperative state officials. The trustee, of course, may complain to the appropriate forum—the bankruptcy court or state court—concerning any improper refusal to issue a license.

[17]The State's complaint concerning the inadequacy of the trustee's bond should likewise be presented to the bankruptcy court.

> in existence in the States of Missouri and Arkansas with respect to the lawful operation and licensing of grain warehouses and grain dealers. That the debtor entities have grain warehouses in both states which prior to bankruptcy were regulated by the States of Arkansas and Missouri. The Court further finds that the Interim Trustee should, to the extent possible, comply with said laws and regulations of the States of Arkansas and Missouri dealing with the licensing and regulating of grain warehouses and grain dealers. That applicant, Robert P. Lindsey, Interim Trustee for the above Debtors, is hereby authorized, instructed, and ordered to comply, to the extent possible, with the above State laws and regulations and to acquire whatever licenses or other written authority is required by the regulatory authorities of Arkansas and Missouri as above set forth.

Clearly, by requiring the trustee to obtain state licenses to operate the warehouses, the bankruptcy court has recognized that the trustee must act consistent with the dictates of 28 U.S.C. § 959(b).[18]

III. Pending Motions.

The trustee has asked this court to require the State to post a bond in favor of the bankruptcy court. We deny that motion.

The trustee also has requested this court to authorize him to sell 31,000 bushels of soybeans now located in the MFA elevator at Bernie, Missouri. We also deny this motion and comment thereon.

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[18]We add that any authorized action by the trustee to liquidate or sell the grain appears to fall within the power of the bankruptcy court to liquidate the debtors' assets under the Bankruptcy Act. We doubt, therefore, that a trustee must obtain a state license solely for liquidation.

Assuming, without deciding, that this court possesses the power to grant such a motion under the Code, we conclude that the trustee has not set forth sufficient facts to justify the sale. The Bankruptcy Code provides that the trustee, after notice and hearing, may sell "property of the estate," other than in the ordinary course of business. 11 U.S.C. § 363(b). Although the grain here in question is "property of the estate" for jurisdictional purposes, its actual ownership has yet to be determined.

The bankruptcy court may authorize the sale of property

> free and clear of any interest in such property of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of such interest;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. [11 U.S.C. § 463(f).]

The trustee has established none of these alternative prerequisites.

We note that a motion to authorize the sale of the Missouri grain is presently pending in the bankruptcy court. In determining whether such a sale should be allowed, that court should carefully consider the requirements of section

363(f) and the duty under the Code to protect the property interests of third parties. The Code provisions make clear that when persons other than the debtor have an interest in the property, adequate protection must be taken "as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." 11 U.S.C. § 361. The bankruptcy court should particularly examine its authority to order the sale if title documents indicate that the estate possesses no substantial ownership rights to the grain and that any bona fide dispute over the property exists only between third parties.

We leave the resolution of these issues, including the sale of the grain stored at Bernie, Missouri, to the bankruptcy court.

IV. **Conclusions.**

We deny the application for writ of prohibition and affirm the order of the district court dismissing the application for a writ of prohibition.

We also add a few comments in our supervisory role over bankruptcy courts in this circuit. The district court noted Missouri's good faith in its efforts to defeat the jurisdiction of the bankruptcy court. We agree, but observe that Missouri officials should have presented the issues raised in the proceeding to the bankruptcy court in the first instance. If dissatisfied with the result, an appeal could have been taken.

We offer the following suggestions to the bankruptcy court:

1) In light of our disposition of the case and the opinion of the district court and this court that the Missouri authorities have proceeded in good faith, the bankruptcy court should consider dismissal of the contempt proceedings.

2) To adequately protect holders of warehouse receipts, particularly Missouri farmers, the bankruptcy court and the trustee may wish to consider the advice of James Boillot, Acting Director of Agriculture for the State of Missouri, either as a party or a proxy or as amicus curiae.

3) The trustee and the bankruptcy court should take steps to expedite the determination of ownership of the Missouri grain, including possible appointment of special masters. *See* Rules of Bankruptcy Procedure 513.

We have by separate order this date dismissed and discharged any and all stays of proceedings in this action.

Writ denied in No. 80-2198; appeal affirmed in No. 80-2179.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

IN RE: STATE OF MISSOURI; STATE OF MISSOURI EX REL JOHN G. RUNYAN, AS DIRECTOR OF THE MISSOURI DEPARTMENT OF AGRICULTURE; STATE OF MISSOURI EX REL MISSOURI DEPARTMENT OF AGRICULTURE; JOHN G. RUNYAN, AS RECEIVER OF CERTAIN GRAIN WAREHOUSES; AND STATE OF MISSOURI EX REL JOHN ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI, *Petitioners*	**NO. J-C-80-244**

OPINION AND ORDER

This proceeding is upon a Petition for Writ of Prohibition by the State of Missouri; State of Missouri Ex Rel John G. Runyan, as Director of the Missouri Department of Agriculture; State of Missouri Ex Rel Missouri Department of Agriculture; John G. Runyan, as Receiver of certain grain warehouses; and State of Missouri Ex Rel John Ashcroft, Attorney General of the State of Missouri (hereafter referred to as Petitioners), to be directed to the Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, and the Honorable Charles Baker, Bankruptcy Judge.

The central issue is whether the Bankruptcy Court has jurisdiction of grain stored in public warehouses owned by Robert W. James and George E. James, Jr., during business in various partnerships as: Cox Cotton Company, James Grain and Cotton Company, Frisbee Cotton Company, James Grain and Elevator Company and James Gin and Elevator Company (hereafter referred to as debtors), pursuant to a Chapter XI proceeding instituted by debtors under the Bankruptcy Reform Act of 1978, where petitioners claim the right to possession of the grain, under the police and regulatory power of the State of Missouri, in the interest of purported depositors and holders of warehouse receipts.[1]

Another related issue is whether the Bankruptcy Court should be precluded from proceeding with contempt proceedings against petitioners for the alleged violation of orders of the Bankruptcy Court.

Because of the interest this proceeding has generated, the Court deems it advisable to narrate the relevant events culminating in this proceeding.[2]

On August 8, 1980, the debtors executed the following instrument:

"TO: Director, Missouri Department of Agriculture
and
Director's Designated Representative in the en-

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[1]The Court permitted Robert P. Lindsey, Trustee of debtors' estate, hereafter referred to as Trustee, to intervene as respondent since the Trustee filed pleadings in opposition to the Petition for Writ of Prohibition and claims the grain as an asset of the estate.

The Court also permitted forty-five (45) Arkansas farmers to intervene as respondents inasmuch as they claim a substantial portion of the grain and participated, without objection, in the oral argument afforded petitioners.

[2]The Court has received amici curiae briefs from the Attorneys General of Texas and Iowa.

forcement of the Missouri Grain Warehouse Law, Chapter 411, RSMo.

Due to circumstances which have adversely affected the financial position of our businesses licensed with the Missouri Department of Agriculture in accordance with the Missouri Grain Warehouse Law, Chapter 411, RSMo, we hereby grant authority to the Missouri Department of Agriculture to take control of all grain contained in the following facilities:

Missouri License No.	USGA No.	Licensed Legal Entity	Location of Facilities
P-UR-98	8-8650	Donald R., Robert W., and George James d/b/a Frisbee Cotton Company	Holcomb, MO
P-UR-431	8-8598	Donald R., Robert W., and George James d/b/a Frisbee Cotton Company	New Madrid, MO (Ristine)
P-UR-430	8-8600	Donald R., Robert W., and George James d/b/a Frisbee Cotton Company	Caruthersville, MO
P-UR-108	8-8573	Donald R. James, Robert W. James, and George E. James d/b/a James Gin & Elevator Company	Naylor, MO

This authority is granted for the purpose of insuring that all grain is fairly and equitable disbursed, either in full or in pro-rata to the rightful owner(s) and/or depositor(s) thereof. . . ."[3]

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[3]Section 411.519(1)(2) and (6) of Title 26 of Missouri's Grain Warehouse Law provides:

"1. Whenever it appears to the satisfaction of the director that licensed warehouseman does not have in his inventory sufficient grain to cover the outstanding receipts and scale tickets issued or assumed by him, or when the warehouseman refuses to submit his records or property to lawful examination, the director may give notice to the warehouseman to comply with any of the following requirements:

"(1) Cover the shortage by supplying the grain or evidence of ownership of the grain;

"(2) Give additional bond as required by the director;

(Continued on next page)

On August 11, 1980, debtors filed voluntary petitions in the United States Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, for liquidation, pursuant to Chapter VII of the Bankruptcy Code.[4]

The Director of the Missouri Department of Agriculture, John G. Runyan, on August 12, 1980, petitioned the Circuit Courts of New Madrid, Dunklin, Pemiscot, Ripley and Butler Counties, Missouri—the locations of four of debtors' warehouses—for appointment as receiver of the warehouses.

The orders of the Missouri Circuit Courts, in addition to appointing the Director receiver, authorized the Director to conduct an audit of the financial affairs of the debtors and carry out such operational liquidation of grain warehouses in a manner that would promote and protect the interest of the depositors of grain.

Footnote continued

"(3) Submit to such examination as the director may deem necessary;

. . .

"2. Upon receipt of the director's verified petition setting forth the circumstances of the warehouseman's failure to comply with this chapter and further stating reasons why immediate possession by the director or his authorized agent is necessary for the protection of depositors, warehouse receipt holders or sureties, the court shall forthwith issue an order authorizing the director or his authorized agent to take immediate possession. . . .

. . .

"6. If at any time, the director, whether or not he or his authorized agent has possession as authorized by this section, has evidence that a warehouseman is insolvent or is unable to satisfy the claims of all depositors, the director may petition the circuit court for the appointment of a receiver to operate or liquidate the business of the warehouseman in accordance with law."

The value of the grain has been estimated as in excess of $5,000,000.

[4]A voluntary petition for reorganization under Chapter XI of the Bankruptcy Code was also filed by James-Agri Center, Inc. on the same day. James-Agri Center, Inc. is a debtor in possession under the Bankruptcy Code.

Robert P. Lindsey was appointed Interim Trustee by the Bankruptcy Court, on August 15, 1980, for the purpose of operating the businesses of the debtors. On August 29, 1980, the Bankruptcy Court entered its order authorizing the Trustee to assume certain executory contracts of the debtors, as modified, with the three grain producers.

On September 3, 1980, Petitioners filed in the Bankruptcy Court an "Application for Determination of Ownership of Customer-owned Assets [the grain in question], for Liquidation . . . and Distribution of the Proceeds." However, on September 22, 1980, the date the Bankruptcy Court scheduled a hearing on Petitioners' application, Petitioners voluntarily served notice of dismissal of their request for determination of ownership of the grain.

On September 11, 1980, the Bankruptcy Court entered an order approving the Interim Trustee's Application for Approval of Grain Dealer and Warehouse Operator's Licenses and Establishing Trustee's Bond at $1,000,000; and further directing the Trustee to "comply, to the extent possible," with the laws and regulations of Missouri dealing with the licensing of grain warehouses and grain dealers. The Bankruptcy Court also found that the bond would satisfy the requirements of the States of Missouri and Arkansas regarding the bonding of grain dealers and warehouses "and will be consistent with the Bankruptcy Code and will adequately protect all creditors of the above entities."

The Bankruptcy Court further ordered Petitioners to remove immediately:

> ". . . any locks, chains, or other security devises at or upon any grain elevators or facilities owned and operated by the above captioned debtor entities so that applicant may take possession of said warehouses and facilities, receive grain, and operate the businesses of

the debtors consistent with previous orders of this Court."

The Bankruptcy Court on September 15, 1980, found, after conducting a hearing, that a substantial quantity of grain was stored in each of debtors' warehouses in need of preservation and protection from loss, destruction and damage; and that certain persons, farmers-producers, had seized and taken possession of the warehouses for the purpose of preventing the Trustee from fulfilling "certain milo contracts with farmers in Arkansas and Missouri and grain purchasers." The Bankruptcy Court further ordered, effective, however, September 11, 1980, United States Marshals for the Eastern District of Arkansas and the Eastern District of Missouri to:

> "... remove and take physical custody and possession of any equipment, personal property, or persons found to be blockading, obstructing, or in any way interfering with the facilities of the debtor entities without the expressed written permission of Trustee, Robert P. Lindsey; that the U.S. Marshals for the above districts be and they further are hereby ORDERED and DIRECTED to assist Trustee in his request to remove any person or property found to be blocking access or entrances to any of the debtor's premises wherever located; and the United States Marshals for each of the above districts be and they are hereby ORDERED and DIRECTED further to arrest and bring before this Court any person found to be blockading, barricading, or in any other manner interfering with Trustee's capacity to operate the debtor's business in each of the above captioned proceedings; and, any such person or persons shall be brought by the United States Marshals for the above districts before this Court at Little Rock, Arkansas, to show cause, if any they have, why they should not be held in contempt of this Court ..."

On September 17, 1980, Petitioners relinquished possession of the warehouses to the United States Marshals and the Trustee.

On September 22, 1980, debtors converted their Chapter VII liquidation proceedings to reorganization under Chapter XI of the Bankruptcy Code.[5]

On September 23, 1980, the Trustee filed an adversary proceeding in the Bankruptcy Court for leave to sell all grain free and clear of any lien. A hearing was scheduled by the Court for October 27, 1980. The Trustee also filed fourteen additional adversary proceedings seeking specific performance of grain contracts against producers in Arkansas and Missouri.

The following order was issued by the Circuit Court of New Madrid County, Missouri, on October 20, 1980, at the request of Petitioners:

> "ORDERED, that, pursuant to Chapter 411, RSMo, as amended, the Director and his authorized agents are hereby directed to take possession of and seize, by physical means, if required, the five Grain Warehouses as described in the plaintiffs' Petition herein and the grain and records contained therein; and it is further
>
> . . .
>
> "ORDERED, that the plaintiffs' motion for a temporary restraining order is granted in all respects by this order; and it is further
>
> "ORDERED, that the defendants[6] show cause be-

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[5]Subsection (a) of 11 U.S.C. § 706 gives a debtor one absolute right to conversion of a liquidation proceeding to a reorganization case under Chapter XI of the Bankruptcy Code. (*see*: H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 380.)

[6]Defendants in the Missouri Circuit Court proceeding are Robert P. Lindsey, Trustee, debtors in the Bankruptcy proceedings and James Agri-Center, Inc., as Debtor in possession in Bankruptcy Case No. J-80-155-B.

fore this Court at the courthouse in New Madrid County, Missouri on November 6, 1980, at 10:30 A.M., or as soon thereafter as counsel can be heard (the 'Hearing Date'), WHY an order should not be made herein enjoining and restraining the defendants and each of them, . . .

"(b) commencing or further prosecuting any proceedings in any court other than this Court, whether or not now pending, involving any or all of the subject matter of this proceeding;

"(c) taking any action or steps in defendant Lindsey's adversary proceeding pending in the bankruptcy court in Arkansas under Nos. J-80-154-B and J-80-155-B as against any of the several hundred individual defendants therein who are depositors of grain or holders of receipts issued by any of the five Missouri Grain Warehouses, and from noting any purported default by any of such defendants therein or from otherwise affecting their ownership of or rights in such grain in any manner;

"(d) moving, transferring or removing any of the grain now contained in any of the five Missouri Grain Warehouses referred to in the Petition herein;"

On October 22, 1980, the Trustee petitioned the Bankruptcy Court for contempt citation, temporary restraining order, preliminary injunction and permanent injunction against Petitioners for the purported violation of the prior order of the Bankruptcy Court; and enjoining them from interfering with the Trustee in the operations of the debtors' businesses. A hearing was scheduled for October 22, 1980, at 9:00 a.m., at the United States Post Office and Courthouse Building, Little Rock, Arkansas.

The following order was issued by the Court of Appeals for the Eighth Circuit:

"Petition for a Writ of Prohibition filed by the State of Missouri ex rel. John G. Runyan, et al. (Petitioners) and directed to the United States Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division and Charles W. Baker a Bankruptcy Judge of that Court, having been considered by the Court, is hereby denied without prejudice to the filing of said petition for a Writ of Prohibition in the United States District Court for the Eastern District of Arkansas on or before Thursday, October 30, 1980.

"The Court further directs a stay of all proceedings in cause Nos. J-80-154-B and J-80-155-B now pending before the Bankruptcy Court until the Writ of Prohibition has been presented to and ruled upon by the United States District Court for the Eastern District of Arkansas."[7]

The thrust of Petitioners' argument for writ of prohibition may be summarized: the Bankruptcy Court does not have subject matter jurisdiction since a substantial portion of the grain in debtors' warehouses is not owned by them. Consequently, the grain is not an asset of the estate and the Bankruptcy Court did not acquire jurisdiction under any provision of the Bankruptcy Code. Petitioners concede that debtors own 2.3% of the grain.

Moreover, Petitioners contend that the State of Missouri has elected to invoke its police and regulatory powers in order to exercise its right to exclusive possession of the grain for the use and benefit of the depositors-owners. Hence,

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[7]On November 18, 1980, a stipulation between Petitioners and the Trustee, with approval of this Court and the Court of Appeals, was entered of record modifying the Court of Appeals' Stay to the extent that all issues unrelated to the jurisdiction of the Bankruptcy Court to exercise control over the grain, were eliminated from the effects of the Court of Appeals' Stay.

the Bankruptcy Court is powerless to exercise any control over the grain.[8]

JURISDICTION OF THE BANKRUPTCY COURT

Under the Bankruptcy Reform Act of 1978, a debtor's estate is created immediately upon the filing of a petition for relief with the district court clerk. 11 U.S.C. § 541(a). The estate created is composed of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The legislative history of the Bankruptcy Code demonstrates that the scope of Section 541 was intended to be extremely broad. *See*: H.R. Rep. 595, 95th Cong. 1st Sess. 367 (1977).

Title 28 U.S.C. § 1471(e) provides:

> "The bankruptcy court shall have exclusive jurisdiction over all the property of a debtor wherever located of all legal and equitable interests of the debtor in property at the commencement of the case."

While the interest of a debtor in property is determined by State law, the question whether such property is property of the debtor's estate is a federal question to be resolved under the Bankruptcy Code. 4 Collier on Bankruptcy, ¶ 541.02 (15 Ed. 1979); *See*: H.R. Rep. No. 95-989, 95th Cong., 2d Sess. 367-68 (1977); S. Rep. No. 95-989,

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[8]It is clear that the property in question was located on property owned by debtors at the time debtors commenced their Chapter VII proceeding and, consequently, debtors had possession. While debtors sought to deliver possession to Petitioners by executing and delivering a written document to Petitioners, Missouri Grain Warehouse Law does not expressly provide for such a method. Moreover, there is no claim that there is a shortage of grain, or any fradulent conduct on the part of the debtors in any way, but on the contrary the contention is there is a surplus of grain. Except for insolvency of a grain dealer–the basis under Missouri Law for the appointment of a receiver–insufficiency of inventory appears to be the only other statutory ground authorizing the State to assume possession of grain in the interest of depositors.

95th Cong., 2d Sess. 82-84 (1978); 11 U.S.C. § 541; Rule 701 of the Bankruptcy Rules.

The Senate Report, commenting on the broad jurisdiction given Bankruptcy Courts over the debtor and all of his property, including property in dispute, states:

> "... This broad grant of jurisdiction will enable the bankruptcy courts, which are created as adjuncts of the district court for the purpose of exercising the jurisdiction, to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in the State court on in the Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy court. The idea of possession and consent as bases for jurisdiction is eliminated. The adjunct bankruptcy courts will exercise *in personam* jurisdiction as well as *in rem* jurisdiction in order that they may handle everything that arises in a bankruptcy case."

S. Rep. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. 153 (1978); 11 U.S.C. § 105.

Rule 701 which has been characterized as the most important of a number of special rules regulating the disposition of disputes provides:

> "The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dis-

chargeability of a debt. Such a proceeding shall be known as an adversary proceeding."

It seems clear, at the very least, the Bankruptcy Court has jurisdiction to resolve the competing claims to the property in question by scrutinizing the respective legal and equitable interests and decide whether the debtors' interest is such that it is property of the estate within the meaning of Section 541 of the Code.

The Court is persuaded that the Bankruptcy Reform Act of 1978 was designed to empower Bankruptcy Courts to touch all those aspects of a debtor's affairs that bear on his finances. This conclusion is inescapable in light of Title 28 U.S.C. § 1481 which grants Bankruptcy Courts powers of a "court of equity, law and admiralty" and Title 11 U.S.C. § 105 which authorizes the Court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code.

Petitioners' effort to interpose the police and regulatory powers of the State of Missouri in order to buttress their claim of exclusive possession over the grain and defeat the jurisdiction of the Bankruptcy Court, while, seemingly, made in the utmost of good faith, must be rejected by this Court for the following reasons:

A. NOT AN EXERCISE OF POLICE OR REGULATORY POWERS

The Court is persuaded that the actions of Petitioners in asserting the claim of possession of the grain, in the alleged interest of depositors, and instituting legal proceedings in the Missouri courts, in an effort to solidify and strengthen their posture, are not an exercise of the police and regulatory powers of Missouri that would otherwise place Petitioners' activities within the exception to the

scope of the Bankruptcy Court's jurisdiction under Title 11 U.S.C. § 362(b)(4).[9]

It is plain Petitioners are not endeavoring to prevent a violation of consumer protection, environmental protection, fraud or a similar police or regulatory law involving the safety, health, morals and the general welfare of society, but on the contrary, Petitioners' sole objective is to protect the pecuniary interests in property of purported depositors. Consequently, Petitioners' action does not fall within the *exception to the jurisdiction* of the Bankruptcy Court where a governmental unit is enforcing a police or regulatory power. *See*: 95 Cong. Rec. H 11092 September 28, (1978).

The United States Supreme Court in *Lawton* v. *Steele*, 152 U.S. 133 (1894), in discussing the extent and limits of a state's police power, made the following observation:

> ". . . It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement . . . of whatever may be regarded as a public nuisance . . ."[10]

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[9]11 U.S.C. § 362(b)(4) provides:

> "The filing of a petition . . . does not operate as a stay—
>
> . . .
>
> (4) . . . of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;"

[10]The following are examples which have been regarded as a reasonable exercise of the police power: *Penn Central Transportation Co.* v. *City of New York*, 98 S.Ct. 2646 (1978) (New York City's Landmark Commission can designate the Grand Central Terminal an historic landmark and thereafter prohibit the construction of a multi-story tower above it; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962) (municipality can prohibit sand and gravel operations beneath the water table within its borders); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) (city can regulate air pollution emanating from federally licensed vessels); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (state entomologist can order the cutting of red cedar trees to protect apple

(Continued on next page)

B. WAIVER OF SOVEREIGN IMMUNITY

Petitioners, on September 3, 1980, petitioned the Bankruptcy Court to determine ownership of the grain, and for an order of the Court permitting liquidation and distribution of the proceeds. Nineteen days later, and on the date the Bankruptcy Court scheduled a hearing on Petitioners' request, Petitioners served notice of dismissal of their application for affirmative relief.

Petitioners also petitioned the Bankruptcy Court for an order modifying the Trustee's bond which they stipulated should be set at $1,000,000.

The Court is presuaded that the Bankruptcy Court's jurisdiction, unlike the jurisdiction of other tribunals, can be waived as a substantive matter. Rule 915 of the Bankruptcy Rules provides that a party consents to jurisdiction of an adversary proceeding if he does not promptly make objection in a timely answer or motion.

It is plain that a state is not immunized from the provisions of the Bankruptcy Code. 11 U.S.C. § 542 provides for the turnover of property by an "entity." An entity includes, by definition, any "person, estate, trust, governmental unit." 11 U.S.C. 101(14). And governmental unit means "... State ... or instrumentality of ... a State" 11 US.C. § 101(21).

Petitioners invoked the jurisdiction of the Bankruptcy Court by filing a written pleading seeking affirmative relief; they were not obligated to follow this course of action, but did so in an attempt to benefit themselves. In so doing,

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Footnote continued
orchards from cedar rust disease); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (municipality can ban brickyards within its boundaries); *Lawton* v. *Steele*, 152 U.S. 133 (1894) (state official can destroy fish nets to enforce a New York fish and game statute).

Petitioners waived any arguable sovereign immunity.[11] *See*: *In Re Crisp*, 521 F. 2d 172 (2nd Cir. 1975); *Gardner* v. *New Jersey*, 329 U.S. 565 (1947); *Gwilliam* v. *United States*, 519 F. 2d 407 (9th Cir. 1975); *In Re Dolard*, 519 F. 2d 282 (9th Cir. 1975).

SUPREMACY CLAUSE

The Bankruptcy Act of 1978 has its origin from an express grant of authority in the United States Constitution, Article I, § 8, clause 4 empowering Congress:

> "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

In *Katchen* v. *Landy*, 382 U.S. 323 (1966), the Supreme Court emphasized that courts of bankruptcy are vested with jurisdiction in law and in equity to implement the provisions of the Bankruptcy Act.

While the Court is persuaded that the Bankruptcy Code of 1978 does not annul a state's insolvency law,[12] the operative effects of such a state provision is suspended to the extent its enforcement would conflict with the Bankruptcy Code or with a Congressional policy. *See*: H. Rept. No. 95-959, 317; 11 U.S.C. § 106; *Perez* v. *Campbell*, 402 U.S. 637 (1971).

In *Perez* v. *Campbell*, supra, the Supreme Court held an Arizona Motor Vehicle Safety Responsibility Act—

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[11]Petitioners or their representatives appeared in person, before the Bankruptcy Court, received copies of the orders entered by the court, but took no steps to appeal such orders or object to the jurisdiction of the court to enter such orders. Petitioners relinquished possession of debtors' warehouses, and the keys thereto, to the Trustee and agreed not to intrfere with the Trustee's operation of debtors' businesses.

[12]The Court is of the view that paragraph 6 of Missouri Warehouse Grain Act § 411.519 is in the nature of an insolvency measure. It is important to note that Petitioners based their state court proceeding on paragraph 6 in requesting the appointment of a receiver and injunctive relief against the Trustee and debtors.

which provided "discharge in bankruptcy following the rendering of any such judgment [as a result of an automobile accident] shall not relieve the judgment debtor from any of the requirements of this article"—unconstitutional and violative of the supremacy clause since the measure was in direct conflict with a provision of the Bankruptcy Act.

It is universally recognized that state legislation that frustrates the full implementation and effectiveness of federal law is invalidate by the Supremacy Clause of the Federal Constitution. *Perez* v. *Campbell,* supra; United States Constitution, Art. VI, cl. 2.

OWNERSHIP OF THE GRAIN PRESENTS A FACTUAL ISSUE

In *Ex Parte In The Matter of Chicago, Rock Island & Pacific Railway Company, Petitioner,* 255 U.S. 273 (1921), the Supreme Court made the following pertinent expression:

> "There is a well-settled rule by which this court is guided upon applications for writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. . . . If, however, the jurisdiction of the lower court is doubtful, . . . ; or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record, . . . ; or if the complaining party has an adequate remedy to appeal or otherwise, . . . ; the writ will ordinarily be denied. . . ."

In *United States* v. *Boe,* 543 F. 2d 151 (1976 Cust. &

Pat. App.) the Court stressed that a party requesting writ of prohibition has the burden of showing a clear and indisputable right to relief and must demonstrate exceptional circumstances necessitating the relief sought.

Petitioners concede that the debtors own 2.3% of the grain in dispute. On the other hand, the Trustee contends that all of the grain constitutes an asset of the debtors' estate. Intervenors—45 Arkansas farmers—assert emphatically that a substantial portion of the grain, if not all, belongs to them.

The Trustee has failed a petition in the Bankruptcy Court for permission to sell the grain. The Court was advised during oral argument that both Arkansas and Missouri farmers have filed answers either acquiescing in the request or opposing it.

Surely, confronted with this posture of the proceedings, the Bankruptcy Court must determine ownership before affording any relief on the Trustee's application to sell the grain.

The Court is of the view that not only would it be improvident to issue a writ of prohibition in light of the existence of a fact question to be resolved, but, for the additional reason, the Petitioners are not without an adequate remedy in the event they should not prevail in the Bankruptcy Court. Petitioners' right to an appeal from a decision of the Bankruptcy Court is secured under the Bankruptcy Code.

The Court is persuaded that *Ex Parte In the Matter of Chicago, Rock Island & Pacific Railway Company, Petitioners,* supra, is applicable here.

CONCLUSION

The Court is persuaded that Petitioners' request for writ of prohibition to the Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, and the Honorable Charles Baker, Bankruptcy Judge, should not be granted so far as Petitioners' request relates to the jurisdiction of the Bankruptcy Court to assume control over the grain located in debtors' warehouses; accordingly, said petition be, and it is hereby, dismissed in part; and,

The Court is of the opinion that Petitioners' petition appears to state a meritorious case regarding the proposed proceedings against Petitioners for purportedly disobeying orders of the Bankruptcy Court. Accordingly, the Honorable Charles Baker and the Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, are hereby ordered and directed to answer the petition, so far as said petition relates to the proposed contempt proceeding contemplated by the Bankruptcy Court, with brief in support thereof, within ten days of service of this order upon the Honorable Charles Baker.

IT IS FURTHER ordered that the Clerk of this Court be, and he is hereby, directed to serve a copy of this instrument upon the Honorable Charles Baker, Bankruptcy Judge, and Robert S. Lindsey, Trustee of debtors' estate.

Dated this 2nd day of December, 1980.

George Howard, Jr.
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

In re: STATE OF MISSOURI; STATE OF MISSOURI EX REL JOHN G. RUNYAN, AS DIRECTOR OF THE MISSOURI DEPARTMENT OF AGRICULTURE: STATE OF MISSOURI EX REL MISSOURI DEPARTMENT OF AGRICULTURE; JOHN G. RUNYAN, AS RECEIVER OF CERTAIN GRAIN WAREHOUSES; and STATE OF MISSOURI EX REL JOHN ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI, *Petitioners*	LR-C-80

PETITION FOR WRIT OF PROHIBITION
PURSUANT TO 28 U.S.C. § 1651

COMES NOW the State of Missouri, the Missouri Department of Agriculture, John G. Runyan as Director of the Missouri Department of Agriculture, John Ashcroft, Attorney General of the State of Missouri and John G. Runyan in his capacity as receiver pursuant to orders dated August 12, 1980 of the Missouri Circuit Court of five grain warehouses described herein and located in the State of Missouri (together, the "Petitioners"); and, pursuant to 28 U.S.C. § 1651 and all other applicable statutes, rules and laws, and in accordance with an order dated October 21,

1980 issued by the United States Court of Appeals for the Eighth Circuit, the Petitioners hereby respectfully petition this Court to issue a Writ of Prohibition prohibiting the United States Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division (the "Bankruptcy Court") and Hon. Charles W. Baker, a Bankruptcy Judge of that Court (the "Bankruptcy Judge") (together, the "Respondents") (1) from exercising any power or authority over or with respect to (a) the Petitioners' enforcement of the Missouri Grain Warehouse Law (Chapter 411, R.S. Mo.) and the Missouri Grain Dealers Law (Chapter 276, R.S. Mo.) (together, the "Missouri Grain Laws"), or from prohibiting or impending Petitioner's enforcement of those laws or regaining possession of the grain in such five grain warehouses or (b) the grain contained in such five public grain warehouses, which is owned by the depositors of such grain and holders of receipts issued therefor by such warehouses and is subject to the jurisdiction of Petitioners and the Circuit Court of the State of Missouri for the protection of such depositors and receipt holders, and (2) from initiating, prosecuting, hearing or deciding any proceedings to hold any of the Petitioners in contempt of court; and in support of the relief requested, Petitioners respectfully allege the following:

Prior Prohibition Proceedings and Brief Summary of This Controversy

1. On October 21, 1980 the Petitioners petitioned to the Court of Appeals for the Eighth Circuit for the issuance of a Writ of Prohibition against the Respondents so as to prohibit the Respondents' exercise of extra-jurisdictional power as described herein. The petition was made to that Court because of an urgent need for relief. On the evening of October 20, 1980, the Respondent Bankruptcy Judge placed a telephone call to Petitioners' counsel at his home. He stated that contempt proceedings would be heard against

the Director of the Missouri Department of Agriculture (the "Department") at 9:00 A.M. on October 22, 1980 at the Bankruptcy Court in Little Rock, Arkansas.

2. This threatened contempt proceeding against the Director, a duly constituted official of the State of Missouri, was in response to the commencement by the Director on October 20, 1980 of a proceeding to enforce the Missouri Grain Laws in the Circuit Court of New Madrid County, Missouri, and the issuance by that Court of an order directing the Director to take possession of the grain in certain public warehouses located in Missouri. That proceeding was begun at the direction of Honorable Joseph Teasdale, the Governor of the State of Missouri. The Governor was concerned with the hardship caused to hundreds of farmers unable to get their grain out of these Missouri warehouses because of proceedings in, and orders granted by, Respondents in bankruptcy cases of the warehouse companies pending before Respondents.

3. In that State court proceeding, the Court, as authorized by the Missouri Grain Laws, issued an order dated October 20, 1980 (the "Enforcement Order") directing that the Director of the Department take possession of and seize five Public Grain Warehouses, including the grain and records contained therein, formerly operated by two debtor partnerships and one debtor corporation that had filed voluntary bankruptcy proceedings pending in the Bankruptcy Court. A copy of the Enforcement Order dated October 20, 1980 issued by the Circuit Court of New Madrid County, Missouri is included as Exhibit A in the Petitioners' accompanying exhibit volume (the "Exhibit Volume"). All exhibits in the Exhibit Volume are hereby incorporated by reference herein as if set forth at length herein.

4. The issuance of the Missouri Circuit Court's Enforcement Order dated October 20, 1980 was not precluded by

the pendency of the bankruptcy cases for several reasons: The Respondents are without subject matter jurisdiction to prevent enforcement by Petitioners of the Missouri Grain Laws with respect to these public grain warehouses located in Missouri. The Missouri Grain Laws were enacted pursuant to the police and regulatory power of the state; the proc ding initiated by Petitioners in the Circuit Court on October 20, 1980 was to enforce their police and regulatory power pursuant to the Missouri Grain Laws. Respondents have no subject matter jurisdiction with respect to the grain contained in these warehouses, which is not part of the estate of the debtor companies; under the provisions of the Missouri Grain Laws, the grain is owned by the grain depositors and holders of receipts issued by those warehouses. The continued exercise of power, dominion and control by the Respondents over the grain contained in the public grain warehouses, the Respondents' issuance of orders authorizing the seizure of such grain from the Petitioners, the Respondents' declination to recognize that they have no jurisdiction with respect to such grain and that the Petitioners have the exclusive jurisdiction over this grain under the Missouri Grain Laws, the threatening of criminal contempt proceedings and imprisonment by the Bankruptcy Judge against the Petitioners, and the giving of only 36 hours' oral notice by the Respondents to the Petitioners' counsel, without giving written notice stating the essential facts constituting the contempt charged and whether the contempt was alleged to be civil or criminal or both and without allowing a reasonable time for preparation of a defense, although advised of the Petitioners' belief that the Respondents had no subject matter jurisdiction, are actions beyond the power and jurisdiction of the Respondents and are in violation of federal and state laws and the Constitution of the United States. Respondents have usurped power and acted in an extra-jurisdictional manner; they have at-

tempted, by the use of threats of force and contempt proceedings including the sanction of imprisonment, to force Petitioners not to exercise their lawful powers and duties.

5. Petitioners desired to avoid a confrontation between armed representatives of the State of Missouri, and United States Marshals, previously ordered by Respondents to take control of these warehouses in Missouri. Under these circumstances, Petitioners sought a Writ of Prohibition against Respondents from the Court of Appeals for the Eighth Circuit on October 21, 1980. The Court of Appeals issued its order dated October 21, 1980 in response to that petition, by which it (a) stayed all proceedings in Cause Nos. J-80-154-B and J-80-155-B, described below, pending in the Bankruptcy Court until the Petitioners presented a petition for a Writ of Prohibition to this Court and this Court has ruled upon such petition and (b) denied the Petitioners' petition for such writ without prejudice to the filing of a petition for a Writ of Prohibition in this Court on or before October 30, 1980. A copy of the order dated October 21, 1980 issued by the Court of Appeals for the Eighth Circuit is included as Exhibit B in the Exhibit Volume.

The Debtor Companies, Their Bankruptcy Cases and Their Missouri Grain Warehouses

6. Cause Nos. J-80-154-B and J-80-155-B pending in the Bankruptcy Court, referred to in the October 21, 1980 order of the Court of Appeals, were filed on August 11, 1980 as voluntary bankruptcy cases by Donald R. James, Robert W. James and George E. James, Jr. (the "Jameses") doing business under various partnerships and other names including Cox Cotton Company, James Grain & Cotton Company, Frisbee Cotton Company, James Grain & Elevator Company and James Gin & Elevator Company (the "Partnership Debtors"). The Partnership Debtors originally filed

these proceedings for their liquidation pursuant to Chapter 7 of the Bankruptcy Code; on or about September 22, 1980 they converted their liquidation cases to reorganization cases under Chapter 11 of the Bankruptcy Code.

7. Robert P. Lindsey (the "Bankruptcy Trustee") was appointed interim trustee of the Partnership Debtors by the Bankruptcy Court on or about August 12, 1980, several days after the Partnership Debtors turned over physical possession and control of their Missouri public grain warehouses to the Director and his staff on August 8, 1980.

8. On August 12, 1980 the Director was appointed receiver of these warehouses by the Missouri State courts. Petitioners believe that the Bankruptcy Trustee qualified as such after the Director was appointed receiver of the public grain warehouses on August 12, 1980 by the Missouri Circuit Courts of the counties in which the public grain warehouses are located.

9. Four of these public grain warehouses, located at New Madrid (Ristine), Holcomb, Caruthersville and Naylor, all in Missouri, had been operated by the Partnership Debtors. The fifth public grain warehouse, located at Neelyville, Missouri, has been operated by a corporation controlled by the Jameses, James Agri-Center, Inc. (the "Corporate Debtor"). The Corporate Debtor filed a voluntary reorganization case under Chapter 11 of the Bankruptcy Code on August 11, 1980, and is a debtor in possession; no trustee has been appointed for the Corporate Debtor. The five public grain warehouses formerly operated by the Partnership Debtors and the Corporate Debtor are herein called the "Public Grain Warehouses".

The Parties to This Proceeding

10. The Petitioners are the following: State of Missouri, a sovereign state seeking to terminate the extrajurisdic-

tional exercise of power by the Respondents which is preventing the enforcement of its laws by its authorized officials and employees; John G. Runyan, as Director of the Department, and the Department, both of whom are charged by law with enforcement of the Missouri Grain Laws; John G. Runyan, as receiver of the grain in the Public Grain Warehouses, appointed as such on August 12, 1980 by the Circuit Courts for the Counties of New Madrid, Dunklin, Pemiscot, Ripley and Butler, State of Missouri, pursuant to the Missouri Grain Laws; and John Ashcroft, the Attorney General of the State of Missouri, charged with the duty to enforce laws of the State of Missouri.

11. The Respondents are: the Bankruptcy Court, a separate department of the United States District Court for the Eastern District of Arkansas, in which the bankruptcy proceedings of the Partnership Debtors and Corporate Debtor are pending; and the Bankruptcy Judge, a judge of the Bankruptcy Court before whom such bankruptcy proceedings of the Partnership Debtors and Corporate Debtor are pending.

12. Relief is not sought by this petition against the Partnership Debtors or Corporate Debtor, nor against the Bankruptcy Trustee. Relief is sought against Respondents, whose exercise of power beyond their jurisdiction has enabled the Bankruptcy Trustee to gain dominion and control over the four Public Grain Warehouses formerly operated by the Partnership Debtors and of the grain contained therein, and has prevented the lawful exercise of jurisdiction, possession and control over such grain by Petitioners.

13. Such grain is not owned by the Partnership Debtors' estates but is owned by the depositors and receipt holders. Without any colorable basis in law, the Bankruptcy Trustee in proceedings before Respondents, has asserted ownership of the grain in the four Public Grain Warehouses of which

he is trustee. This claim is in violation of the Missouri Grain Laws under which the depositors and receipt holders are the owners; under the Missouri Grain Laws, Petitioners have the duty to protect the depositors and receipt holders and to enforce the provisions of such laws. Respondents are preventing such enforcement.

This Controversy Involves Extraordinary Circumstances and Respondents' Usurpation of Power

14. The controversy between Petitioners and Respondents involves extraordinary circumstances. Nonexistent jurisdiction has been asserted by the Bankruptcy Judge over the State of Missouri and its duly constituted authorities including particularly the Department, its Director and the Missouri Circuit Court. The Respondents have willfully disregarded the legislative policy of the State of Missouri as contained in its Grain Warehouse Laws, enacted pursuant to the State's police power to regulate an industry affecting the public interest. Petitioners' possession of the grain in these warehouses was obtained by means of its voluntary surrender by the debtor companies and orders issued by the Missouri courts. Petitioners' enforcement efforts have been met by contempt proceedings orally ordered by Respondents.

15. Under the Missouri Grain Warehouse Law, the Director has the right and duty to enforce its provisions, which have been exercised by him in various respects including:

(a) The Director's acceptance on August 8, 1980 of, and his exercise of dominion and control over, the grain in the Public Grain Warehouses, which was voluntarily given by the Partnership and Corporate Debtors to the Director on August 8, 1980 pursuant to instruments dated that date executed by these Debtors. Copies of the Debtors' instruments turning over possession to the Director are included in the Exhibit Volume as Exhibit C;

(b) The filing of petitions by the Director with the Circuit Courts of the State of Missouri for the five Counties in which the Public Grain Warehouses are located for his appointment as receiver of the grain contained therein, which petitions were granted by orders of the Missouri Circuit Courts dated August 12, 1980, and by his acting as receiver thereunder until ousted by means of intimidation and threats by the Bankruptcy Trustee and United States Marshals invoked by order dated September 15, 1980 issued by the Respondents. A copy of one of the August 12, 1980 orders appointing the Director as such receiver as included in the Exhibit Volume as Exhibit D. A copy of the order of the Respondents dated September 15, 1980 (as of September 11, 1980) invoking United States Marshals and used to oust Petitioners from the Public Grain Warehouses, together with the application of the Bankruptcy Trustee upon which it was granted, is included in the Exhibit Volume as Exhibit E; and

(c) The commencement in good faith of a proceeding (Case No. CIV180-353CC) on October 20, 1980 in the Circuit Court of New Madrid County, Missouri, by the Petitioners as plaintiffs against the Bankruptcy Trustee and others (a) to enforce provisions of the Missouri Grain Warehouse Law and (b) for an order granting immediate possession of the grain contained in the Public Grain Warehouses to the Director and for other relief, and obtaining the Enforcement Order of that Court in that proceeding dated October 20, 1980. Copies of the Petitioners' petition therein, motion for temporary restraining order and preliminary injunction, affidavit of John G. Runyan, Director, Missouri Department of Agriculture, and memorandum of law, together with all exhibits thereto, filed in that proceeding, are included as Exhibit F in the Exhibit Volume. The Enforcement Order issued on those papers is included as Exhibit A.

16. The Director, the Department and their employees were in possession and control of these Public Grain Warehouses commencing on August 8, 1980; they remained in possession and control without interruption from that date until September 17, 1980, subsequent to the filing of the Debtors' bankruptcy cases and the appointment of the Bankruptcy Trustee.

17. On September 17, 1980 the Bankruptcy Trustee ousted the Director and employees of the Department without right, by unlawful means and aided by actions of Respondents in excess of their jurisdiction. Based on Respondents' order dated September 15, 1980 (Exhibit E), the Bankruptcy Trustee threatened the Director with contempt proceedings before the Respondents if possession and control was not turned over; and United States Marshals, acting under the color of the September 15, 1980 order of the Respondents, intimidated employees of the Department. Solely as a consequence of such actions, the Director and employees of the Department relinquished to the Bankruptcy Trustee and such United States Marshals possession of the Public Grain Warehouses other than the one at Nellyville.

18. Through the extra-jurisdictional exercise of power by Respondents, Petitioners were intimidated and forced not to exercise their lawful powers with respect to this grain and not to enforce the Grain Warehouse Laws. When Petitioners subsequently attempted to do so by obtaining the Enforcement Order on October 20, 1980, Petitioners were directed by Respondents to attend before Respondents to be prosecuted for contempt.

Ownership of the Grain

19. All of the grain in these warehouses, having a value exceeding $5 million, has been continuously owned from the time it was delivered to these Public Grain Warehouses for storage and at present is still owned by the depositors

and receipt holders. By law, the receipt holders and depositors have been entitled to the delivery of this grain upon demand; by virtue of orders of Respondents, the receipt holders and depositors have had their grain withheld, in violation of their unquestioned rights under the laws of the State of Missouri and the Constitution of the United States. In proceedings before Respondents, the Bankruptcy Trustee has asserted that he owns this grain, despite the clear and controlling pronouncement of the law of the State of Missouri that the depositors and receipt holders are the owners of grain deposited for storage. The Department has determined from its records of transactions involving grain in the Public Grain Warehouses that the grain contained therein was deposited for storage; such grain is not property of the estate of these Debtors and the Bankruptcy Trustee does not even have a colorable claim to the ownership of such grain. The Department has also determined that such grain depositors prepaid the storage charges for their grain to a date subsequent to the appointment of the Bankruptcy Trustee.

20. The Department and its Director are charged by law with enforcement of the grain laws of Missouri, including its provisions mandating that grain stored in public warehouses be distributed to its owners upon their demand. The Petitioners have been thwarted by Respondents in their efforts to enforce these provisions of the grain laws of Missouri, which were enacted pursuant to the police and regulatory power of the State. There are hundreds of depositors and receipt holders, including many farmers whose property rights are being violated and whose ownership rights have been denied by actions of the Bankruptcy Trustee, with the aid and support of the Respondents. The Respondents have issued notices, directives and orders which have effectively supported the Bankruptcy Trustee's assertion of jurisdiction over the grain in storage in the

Public Grain Warehouses and have prevented the Petitioners from performing their duty to enforce provisions of the Missouri Grain Laws.

21. The quality of the grain contained in these Missouri grain warehouses may be adversely affected if it is not turned and treated in the near future. During the period from August 8, 1980 to September 17, 1980, when Petitioners were in possession of these Missouri warehouses, Petitioners caused this grain to be properly cared for. Petitioners believe that since September 17, 1980 the Bankruptcy Trustee has failed to cause the grain to be turned and treated; the Bankruptcy Trustee stated to Petitioners that those debtor estates did not have the funds to care for this grain. One reason Petitioners took steps on October 20, 1980 to regain possession of this grain was to enable them to insure that the grain would be turned and treated, thereby preserving its quality. Petitioners have been prepared and remain willing and able to expend the necessary funds for this purpose when they regain possession. A sale of this grain by the bankruptcy authorities would not solve the problem involved. All of the owners of the grain, as owners, have the right to decide for themselves the timing of a sale of their own grain. In this case the bankruptcy authorities, as warehousemen, are not performing the warehouseman's basic obligation of caring for the grain so that grain of the same quality as originally deposited is returned to the depositors. Petitioners seek possession of the grain so that that obligation under law in favor of the depositors will be fully performed.

Petitioners' Right and Duty to Enforce the Law is not Precluded by any Bankruptcy Legislation

22. The Petitioners have the legal right and duty to take action, including the commencement and continuation of enforcement proceedings, to protect the rights of such

depositors and receipt holders, to preserve the integrity of the administration of the Missouri Grain Laws by the duly constituted authorities of the State and to uphold the laws of the State.

23. Neither the Bankruptcy Code, nor 28 U.S.C. § 1471 nor any other provision of Public Law 95-598, which became law in 1978 and by which the Bankruptcy Code and 28 U.S.C. § 1471 were enacted by Congress, contains any provision authorizing Respondents to exercise jurisdiction over this grain in which the estates of these Debtors have no ownership interest or to thwart the Petitioners in the exercise and performance of their lawful functions pursuant to the Missouri Grain Laws enacted in furtherance of the police and regulatory powers of the State of Missouri. The Respondents are without subject matter jurisdiction over this grain and have no jurisdiction to prevent the Petitioners from enforcing the Missouri Grain Laws.

24. The Bankruptcy Trustee is engaging in activities at the Public Grain Warehouses without having the licenses required by the Missouri Grain Laws. On or about October 16, 1980 the Bankruptcy Trustee filed license applications with the Department for warehouse and dealer licenses (Exhibit J); the Department has preliminarily determined that these applications are deficient. Among other things, such license applications did not include statements of assets and liabilities of the applicant, as required by law. By the terms of an *ex parte* order dated September 11, 1980 granted by Respondents to the Bankruptcy Trustee, the Bankruptcy Trustee was permitted to file license applications in such manner. A copy of the September 11, 1980 *ex parte* order of Respondents is included in the Exhibit Volume as Exhibit G. In that order the Respondents made a finding that the Bankruptcy Trustee should comply with Missouri law, but only "to the extent possible". Respondents had no jurisdiction to authorize the Bankruptcy Trustee

not to comply with the Missouri Grain Laws in all respects. The license applications, as approved by Respondents and filed with the Department by the Bankruptcy Trustee, deny that the Bankruptcy Trustee holds any property of others; in these license proceedings before the Department, the Bankruptcy Trustee, apparently with Respondents' support, thus claims to be the owner of this grain, although there is no colorable basis for such a claim.

25. The Bankruptcy Trustee asserts that the Bankruptcy Code supersedes and takes precedence over all laws of the State of Missouri with respect of the regulation of public grain warehouses and their operations; this assertion is contrary to federal law, which mandates that the Bankruptcy Trustee comply with applicable State law. The Bankruptcy Trustee is in violation of his obligations under 28 U.S.C. § 959(b), and Respondents have permitted him to do so in order to exercise dominion and control over the Public Grain Warehouses without compliance with the law of the State of Missouri.

26. Petitioners have the legal duty to enforce the provisions of the Missouri Grain Laws under which the depositors and receipt holders are entitled to possession of their grain upon demand. The Bankruptcy Trustee has thwarted the performance of that duty, and has prevented hundreds of depositors and receipt holders, including many farmers, from obtaining possession of their property. The actions of the Bankruptcy Trustee are in direct conflict with the enforcement efforts of the Petitioners. The Respondents are shielding the Bankruptcy Trustee from the enforcement proceedings of Petitioners and are shielding the Bankruptcy Trustee's continuing operations in Missouri in violation of the Missouri Grain Laws.

Respondents' support of Bankruptcy Trustee's efforts— Trustee's Suit against Hundreds of Farmers

27. On or about September 23, 1980, the Bankruptcy Trustee filed an adversary proceeding complaint for authority to sell the grain in the Partnership Debtor's four Public Grain Warehouses; the complaint was filed with the Bankruptcy Court. In that complaint, the Bankruptcy Trustee named several hundred defendants, consisting mostly of the farmers, depositors and receipt holders of this grain; in his complaint the Bankruptcy Trustee asserted that he was the owner of this grain. A claim of ownership of this grain by the Bankruptcy Trustee was not clearly made prior to September 23, 1980. By his complaint, the Bankruptcy Trustee would require hundreds of farmer-depositors of grain, residents of Missouri, to engage, at substantial expense to themselves, lawyers in the Little Rock, Arkansas area to file responses to his complaint. This is a substantial burden on the grain depositors. Petitioners are charged by the Missouri Grain Warehouse Law with the duty of protecting these depositors and warehouse receipt holders. Petitioners initiated their Missouri enforcement action and obtained the Enforcement Order dated October 20, 1980 after the Bankruptcy Trustee finally and clearly declared his intention, without basis in law or in fact, to claim ownership of this grain. The Respondents have no jurisdiction to permit the withholding of this grain and to prevent Petitioners' enforcement proceedings.

Respondents Authorized a Wrongful Seizure

28. Prior to the filing of the Debtors' voluntary bankruptcy cases on August 11, 1980, the Partnership Debtors voluntarily turned over possession and control of the Public Grain Warehouses to the Director and the Department.

(Exhibit C). By orders dated August 12, 1980 the Director was appointed receiver of the Public Grain Warehouses prusuant to the Missouri Grain Warehouse Law. (Exhibit D). Employees of the Department continued in possession of the warehouses from August 8, 1980 until ousted on September 17, 1980 by the Bankruptcy Trustee and United States Marshals, appointed for such purpose by the Respondents; these Marshals and the Bankruptcy Trustee employed intimidation and threats of contempt against Petitioners. Previously, acting contrary to law, the Respondents issued their *ex parte* order dated September 11, 1980 (Exhibit G), by which, in paragraph 5, the Respondents ordered the Department to remove all security devices from these Public Grain Warehouses so that the Bankruptcy Trustee could take possession of the warehouses. Under those circumstances, on September 17, 1980, Petitioners relinquished possession of the warehouses to the Bankruptcy Trustee.

Missouri Enforcement Proceeding

29. On October 20, 1980, Petitioners commenced a proceeding (Case No. CV180-353CC) in the Circuit Court of New Madrid County, Missouri (the "Missouri Enforcement Proceeding") against the Bankruptcy Trustee for the two Partnership Debtors and also against the Corporate Debtor, which is operating its Neelyville, Missouri warehouse as a debtor in possession. (Exhibit F contains the documents in the Missouri Enforcement Proceeding). In so doing Petitioners acted pursuant to the express provisions of the Missouri Grain Laws to enforce those laws enacted pursuant to the police and regulatory power of the State.

30. The direct object of the Missouri Enforcement Proceeding was to obtain an order directing the Director to take immediate possession of and seize the five Public Grain

Warehouses and the grain and records therein, formerly operated by the three Debtor companies, four of which warehouses are presently under the control of the Bankruptcy Trustee. These warehouses and the grain therein are subject to the Missouri Grain Laws and the exclusive jurisdiction of the Department and the Director. The Enforcement Order was issued on October 20, 1980. (Exhibit A).

Respondents Threatened Contempt in Response to the Missouri Enforcement Proceeding

31. A copy of the Enforcement Order was served on the Bankruptcy Trustee during the afternoon of October 20, 1980. It triggered an almost immediate response from the Bankruptcy Judge. During the evening of October 20, 1980, the Petitioners' counsel, James F. Gunn, received a telephone call at his home from the Bankruptcy Judge who stated that he had been provided with a set of the legal papers in the Petitioners' Missouri Enforcement Proceeding. The Bankruptcy Judge stated in substance to Mr. Gunn, among other things, that he considered the commencement of the Missouri Enforcement Proceeding to be a contempt, that on October 21, 1980 the Bankruptcy Trustee would file papers with the Bankruptcy Court to hold the Director of the Missouri Department of Agriculture, Petitioner Runyan, in contempt, that Mr. Gunn's appearance on behalf of the Petitioners was required before the Bankruptcy Judge on October 22, 1980, at 9:00 a.m. in regard to such contempt proceedings and that if the facts were as the Bankruptcy Judge understood them to be, he would enter such contempt orders. The Bankruptcy Judge also said that he was reminding Mr. Gunn that the Bankruptcy Court could enforce its orders with the aid of United States Marshals, a procedure previously employed by the Respondents in these bankruptcy cases to wrest possession of these warehouses from employees of the Department. Mr. Gunn stated to the

Bankruptcy Judge during their conversation that in his opinion the Bankruptcy Court was acting beyond its power because (a) the Bankruptcy Court had no jurisdiction over the grain in the Public Grain Warehouses in view of the ownership of such grain by the depositors and the holders of warehouse receipts issued out of those warehouses, and (b) the Bankruptcy Court had no jurisdiction under the Bankruptcy Code to prevent the State of Missouri from enforcing the Missouri Grain Laws which are police and regulatory enactments of the State.

32. On the following day, October 21, 1980, the Bankruptcy Judge sent telegrams to the Director and to James F. Gunn stating that a hearing would be held before the Bankruptcy Court at 9:00 a.m. on October 22, 1980 in Case No. JO 80-155 on (a) the Bankruptcy Trustee's motion for a preliminary restraining order and permanent injunction against the Director enjoining him and his employees from interfering with the property of the Debtors' estates and (b) the Trustee's motion for an order to show cause why the Director shall not be held in contempt of the Bankruptcy Court. The telegrams were not received until subsequent to the hearing ordered by Respondents for 9:00 a.m. on October 22, 1980; nor were the Petitioners or their attorneys or counsel served by that time with any such motions by or on behalf of the Trustee. No written notice stating the essential facts constituting the contempt charges, or whether the charges were criminal or civil or both, was given by that time to the Director or his attorneys by the Respondents or the Bankruptcy Trustee; nor was a reasonable time for the preparation of any defense afforded by the Respondents to the Director, as required by Rule 920(a)(2) of the Rules of Bankruptcy Procedure. A copy of such telegram to Petitioners' counsel is included as Exhibit H in the Exhibit Volume.

33. Subsequent to October 22, 1980, the Petitioners caused the files of the Bankruptcy Court to be examined and in that manner learned for the first time that the Bankruptcy Trustee filed a complaint (the "Contempt and Injunction Complaint") with the Bankruptcy Court for a contempt citation against the Director of the Department, the Department itself, the Attorney General of Missouri and two employees of the Missouri Grain Inspector. A copy of the Contempt and Injunction Complaint is included in the Exhibit Volume as Exhibit I. The Contempt and Injunction Complaint specifically sought a "trial" on that Complaint on October 22, 1980 at 9:00 a.m. before the Bankruptcy Court and it specifically requested a finding that all of the Petitioners be held in civil and criminal contempt. The trustee also specifically requested in his Complaint that jail sentences be imposed (Complaint, pages 13 and 18). Despite the extreme seriousness of seeking imprisonment of State officials acting in good faith, and despite a trial ordered by Respondents for 9:00 a.m. on the next day, a copy of the Contempt and Injunction Complaint was merely mailed to the Director's attorney, on October 21, 1980; personal service was not even attempted. The certificate of service annexed to the Contempt and Injunction Complaint stated that a copy was mailed to the post office box of a Missouri Assistant Attorney General on October 21, 1980. Such procedures and method of service were unconstitutional and failed to comply with Bankruptcy Rule 920. It was a virtual impossibility that the Petitioners could have received the 18 page Contempt and Injunction Complaint before they were expected to go before the Bankruptcy Court to defend themselves in a contempt trial at 9:00 a.m. on the following date at a place distant from the Assistant Attorney General's Office. The conduct of the Respondents was improper and in violation of the Rules of Bankruptcy Procedure and the Constitution of the United States. The

Respondents failed to act properly by not directing that service of the Contempt and Injunction Complaint be effected upon each and every one of the Petitioners and their attorneys substantially in advance of a reasonable trial date. Respondents participated in this attempted deprivation of Petitioners' constitutional rights. The Respondents' order by telephone on October 20, 1980 and subsequent actions requiring an almost immediate contempt trial violated such Rules and the Constitution. These actions were calculated to deprive the Petitioners of their constitutional rights, in addition to depriving them of the ability to perform their lawful duties of enforcing the Missouri Grain Laws. The Respondents have become advocates in these proceedings instead of confining their role to that of impartial adjudicators, and have exercised, with an inappropriate sense of urgency, powers in excess of their jurisdiction in order to prevent Petitioners from enforcing the Missouri Grain Laws.

34. The contempt action threatened by the Respondents against the Petitioners, in violation of the Rules of Bankruptcy Procedure, was designed to force the Petitioners to discontinue their lawful enforcement of the Missouri Grain Laws and to surrender to Respondents' exercise of extrajurisdictional power; this amounted to a usurpation of power not granted by Congress. Congress has not granted the Bankruptcy Court power to prevent a State from enforcing its statutes enacted pursuant to its police or regulatory power, nor did Congress grant to a Bankruptcy Court power to seize and control property which is not a part of the estate of a debtor. In noticing the hearing in the contempt proceeding, the Bankruptcy Court exceeded its powers, as limited by 28 U.S.C. § 1481, which withholds any jurisdiction on the part of the Bankruptcy Court to punish a criminal contempt not committed in the presence of the Bankruptcy Judge or warranting a punishment of imprisonment.

35. Solely as a consequence of the stay issued by the Court of Appeals on October 20, 1980, none of the proceedings of which Respondents gave notice of hearing for October 22, 1980 were held.

36. Petitioners believe that the notice of contempt proceedings against the Petitioners given by the Respondents for October 22, 1980 was in violation of the temporary restraining provisions contained in the October 20, 1980 Enforcement Order issued by the Missouri Circuit Court. Petitioners have not initiated contempt proceedings, by reason of such violation, against Respondents or the Bankruptcy Trustee in the Missouri Circuit Court, nor have they sought enforcement of that order by invoking the aid of Missouri State Police, which could lead to a physical confrontation with United States Marshals, whose deployment was previously used on September 17, 1980 pursuant to an order of the Respondents (Exhibit E) and whose deployment was again threatened by the Bankruptcy Judge in his telephone conversation with James F. Gunn on the evening of October 20, 1980. Instead, Petitioners initiated their prohibition proceedings before the Court of Appeals for the Eighth Circuit on October 21, 1980 and now file this Petition with this Court so as to prevent the Respondents from continuing to act beyond their powers.

37. Further proceedings have developed in the Bankruptcy Court which make this an unusual case warranting the grant of a writ of prohibition. On or about October 24, 1980 approximately 49 petitioners filed a petition in the Bankruptcy Court to hold Missouri Governor Teasdale, Missouri Attorney General Ashcroft, the Department's Director Runyan and Honorable William L. Raglin, Circuit Judge of New Madrid County, Missouri, in contempt of court. The petitioners in that proceeding claimed that they are farmers who stored grain in Arkansas warehouses of the debtor

companies and that their grain allegedly became mixed with grain in the Missouri warehouses. They have asked that the Bankruptcy Court decide their claims and assert that these officials of the State of Missouri are guilty of willful contempt of the orders of the Bankruptcy Court, that they should be held in contempt, that they should be enjoined and restrained and that the grain should be sold by the Bankruptcy Trustee and the proceeds distributed. Petitioners believe that this is another move, violative of the Eleventh Amendment, to force Petitioners to capitulate to the claimed jurisdiction of the Bankruptcy Court. If, however, the grain owned by those Arkansas petitioners was converted by the debtors, then those petitioners are creditors of the debtor companies and should seek relief as creditors before the Bankruptcy Court. But that does not make the Missouri Grain Laws inoperative or confer jurisdiction in the Bankruptcy Court to oust Petitioners from enforcement of the Missouri Grain Laws with respect to the grain in the Missouri warehouses. The Bankruptcy Court simply has no lawful jurisdiction over this grain. If these claimants wish to assert ownership of any grain in the Missouri warehouses, they would have a full opportunity to do so in the Missouri Enforcement Proceedings; that is one of the very purposes of the Missouri Grain Laws. At most, their petition to hold Missouri officials in contempt raises a question of their claim to ownership of grain in Missouri. But the Bankruptcy Court has no jurisdiction with respect to a possible controversy, among competing ownership claims of third parties; the business of the bankruptcy courts, however, is limited to creditor claims against debtors and property of their estates. The Eleventh Amendment, moreover, prohibits the commencement of proceedings in a federal court of the type initiated by the Arkansas petitioners against these officials of the State of Missouri.

Various Violations of the Missouri Grain Laws

38. Enforcement of the Missouri Grain Laws by the Missouri authorities is essential in this case because of the Bankruptcy Trustee's outrageous claim of ownership of the grain in the Public Grain Warehouses, which has a market value in excess of $5 million and was deposited in the warehouses by hundreds of farmers. The Missouri Grain Warehouse Law, which incorporates the Missouri Uniform Commercial Code, clearly provides in § 411.491 that grain must be released to the depositor or receipt holder "upon demand". Petitioners are charged with the duty to enforce these laws. The Respondents are impeding performance of the obligation and duty of the Petitioners to enforce these laws.

39. The Bankruptcy Trustee is engaging in activities at these warehouses without having the licenses required by the Missouri Grain Laws. The Respondents have protected the Bankruptcy Trustee's activities in violation of the Missouri Grain Laws. They have protected such activities by granting orders authorizing inadequate license applications to be filed with the Department, by authorizing the Bankruptcy Trustee to take possession of the grain in the Public Grain Warehouses that does not belong to the estates of these debtors and by preventing the Petitioners from enforcing the Missouri Grain Laws. On or about October 16, 1980 the Bankruptcy Trustee, after being in office for about two months, finally filed license applications with the Department for warehouse and dealer licenses; the Department has preliminarily determined that these applications are deficient. In these applications, the Bankruptcy Trustee again wrongfully asserts that he does not hold any grain for others and that the Bankruptcy Code supersedes and preempts the Missouri Grain Laws. The Respondents are shielding the Bankruptcy Trustee's

continuing operations at the Missouri warehouses in violation of the Missouri Grain Laws. Copies of the Bankruptcy Trustee's license application, including the statement of assets and liabilities submitted by him to the Department and his attorneys' letter of transmittal, are included as Exhibit J in the Exhibit Volume.

40. The Respondents have assumed power to fix the amount of the bond required to be filed by the Bankruptcy Trustee with the Department in connection with licenses that might be granted to him under the Missouri Grain Laws. By order dated September 11, 1980 (Exhibit G), the Respondents fixed a $1 million bond as a combined bond in favor of the United States and the States of Arkansas and Missouri. The power to fix such bond is vested exclusively in the Department, and the Respondents were without power to make such order.

Prohibition is an Appropriate Remedy in this Case

41. There are numerous independent reasons why a Writ of Prohibition should be granted in this case:

(a) The Bankruptcy Court does not have subject matter jurisdiction to bar enforcement proceedings of the State of Missouri or to exercise jurisdiction over the grain, not part of the estate under Section 541 of the Bankruptcy Code; the grain is unquestionably owned by the depositors and receipt holders. The Bankruptcy Trustee does not even have a colorable claim of ownership, nor is there any colorable basis for jurisdiction in the Bankruptcy Court. The Missouri Enforcement Proceeding is grounded on the Missouri Grain Laws, which expressly authorizes seizure of grain in public warehouses by the Director when authorized by order of the Missouri Circuit Court. The Department and the Director were in lawful possession of this grain before these bankruptcy cases commenced, and the Director was appointed receiver of the grain in all of the warehouses by

orders of the Missouri Circuit Courts dated August 12, 1980. Both the Enforcement Order dated October 20, 1980 and the prior receivership orders are enforcement proceedings that are not related to the pending bankruptcy cases of these Debtors. The Missouri enforcement proceedings are beyond the jurisdiction of the Bankruptcy Court and could not have been removed to that Court by the express terms of 28 U.S.C. § 1478. The Respondents have no power to prohibit enforcement proceedings by the duly constituted authorities of the State of Missouri, and the Respondents have no power over property which is not part of the debtors' estates. The Respondents have acted in excess of the jurisdiction and power conferred on them by the Bankruptcy Code and related statutes. The grain owned by the depositors and receipt holders cannot be used by the Debtors or the Bankruptcy Trustee; the withholding of this grain and the exercise of jurisdiction over it and the thwarting by the Respondents, by ordering contempt proceedings, of the enforcement of the Missouri Grain Laws is beyond the lawful jurisdiction and powers of the Respondents.

(b) It was not intended by the Bankruptcy Code or related enactments contained in Public Law 95-598, by which the Bankruptcy Code was enacted in 1978, that bankruptcy courts have jurisdiction to prohibit or impair enforcement by State authorities of state statutes enacted pursuant to the police or regulatory power of a State or to withhold from the owners property in which the estate has no interest. If a provision of the Bankruptcy Code were construed so as to grant such power and jurisdiction to a Bankruptcy Court, such provision so construed would be unconstitutional under Article 1, Section 8, Clause 4 of the United States Constitution. That provision, the only basis for the enactment of bankruptcy laws by Congress, authorizes Congress to enact ". . . uniform Laws on the subject of Bankruptcies throughout the United States; . . ." A law

that would prohibit the enforcement of police power statutes by a state, not involving property of a debtor, would not be a law "on the subject of Bankruptcies", but instead would abrogate the enforcement of police powers by a State. No provision of the Bankruptcy Code should be construed in a fashion that would render it unconstitutional.

(c) Amendment X to the United States Constitution would be violated by any provision of the Bankruptcy Code or related laws if it were construed to prohibit the enforcement of police power-grounded state laws by State authorities or if State authorities were subjected to contempt proceedings before bankruptcy courts because of their performance of their duties involving the enforcement of police power-grounded State laws. Amendment X reserves to the State of Missouri all powers not delegated to Congress by the Constitution. When enacting the Bankruptcy Code and related amendments Congress did not have or purport to exercise a power that would confer on bankruptcy courts jurisdiction and power to abrogate State laws such as the Missouri Grain Laws, or to abrogate the rights of the State of Missouri under Amendment X to enforce such Laws.

(d) Petitioners are immune from suit in the Bankruptcy Court by virtue of the Eleventh Amendment of the Constitution. Nor are Petitioners required to submit to contempt proceedings in the Bankruptcy Court, which involve the likely imposition of sanctions by the Bankruptcy Judge, including possible imprisonment, in order to maintain enforcement proceedings under the State's statutes; they are not required to submit to these extrajurisdictional powers. Although it is doubtful that a bankruptcy court has the power to imprison for contempt under § 405(a)(1)(B) of Title IV of Public Law 95-598, Petitioner Runyon should not be required to test that question.

(e) The contempt proceedings threatened by Respondents against the Petitioners, despite issuance of the Missouri Circuit Court's Enforcement Order dated October 20, 1980, would effectively constitute a proceeding to enjoin that state court. That court's order directs Petitioner Runyon to seize this grain. The Bankruptcy Court's action would effectively enjoin the Missouri Circuit Court. However, a bankruptcy court has no jurisdiction during the transition period to entertain a proceeding to enjoin a court, by virtue of the express exclusion of such power by § 405(a)(1)(A) of Title IV of the Public Law 95-598.

(f) The Missouri Grain Laws constitute a proper exercise of the police power of the State because the grain warehouse business affects the public interest. It has been long established that a court of bankruptcy does not have power or subject matter jurisdiction to act in a field covered by State legislation enacted in the public interest, where enforcement has been entrusted by the legislature to state agencies; Congress never intended to give courts of bankruptcy or bankruptcy trustees the power to supersede or preempt such state authority. Bankruptcy courts are without power to enjoin enforcement of state law by state authorities acting to enforce their police and regulatory powers. The provisions of the 1978 Bankruptcy Code confirm such lack of power. Although § 362(a) of the Bankruptcy Code provides that the filing of a bankruptcy case automatically stays most proceedings against the debtor and the bankruptcy trustee, § 363(b)(4) and § 363(b)(5) of the Bankruptcy Code expressly provide that a governmental unit may commence or continue to "enforce such governmental unit's police and regulatory power". A "governmental unit", under Code § 101(21), includes a State as well as departments, agencies and instrumentalities of a State. The purpose of this legislation was to insure that States would be free, notwithstanding the bankruptcy of a debtor,

to enforce their laws. House Rep. 95-595, p. 343. Further, 28 U.S. § 1428, dealing with the removal of cases to bankruptcy courts from other courts, confirms that Congress never intended that bankruptcy courts have jurisdiction over, or the power to destroy, a State's action to enforce its police or regulatory power.

42. This petition is filed with this Court as contemplated by the order of the Court of Appeals dated October 21, 1980. (Exhibit B).

WHEREFORE, your Petitioners respectfully request:

1. That a writ of prohibition be issued against the Bankruptcy Court and Bankruptcy Judge prohibiting them from interfering with Petitioners' enforcement of the police and regulatory power of the State of Missouri and in particular that they be prohibited (a) from interfering with Petitioners' enforcement of the Missouri Grain Warehouse Law and the Missouri Grain Dealers Law to the extent herein described, (b) from interfering with steps by Petitioners to regain possession and control of the grain in the Missouri grain warehouses referred to herein, (c) from adjudicating any proceedings seeking to hold any of the Petitioners in contempt and (d) from adjudicating the ownership of the grain contained in such Missouri grain warehouses; and

2. That the Petitioners have such other and further relief as is just.

Dated at Jefferson City, Missouri, October 30, 1980

Respectfully submitted,

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No. 81-79

IN THE

Supreme Court of the United States

October Term, 1981

IN RE STATE OF MISSOURI, et al.,

Petitioners,

—v.—

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS and the HONORABLE CHARLES W. BAKER, et al.,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Dated: August 12, 1981

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QUESTIONS PRESENTED BY THIS SUPPLEMENTAL BRIEF

1. Does a bankruptcy court have subject matter jurisdiction to bar a state from enforcing, as against a grain warehouseman's bankruptcy trustee, the state's grain laws regulating grain warehousing, on the theory that the general exemption from bankruptcy court jurisdiction of governmental actions to enforce police and regulatory power does not apply to state grain laws because they relate primarily to the protection of the pecuniary interests of the grain owners?

2. Can 28 U.S.C. § 1471 be construed to confer subject matter jurisdiction on a bankruptcy court (a) to preclude the exercise of a state's police and regulatory power over grain deposited for storage with a debtor-warehouseman prior to its bankruptcy in which the debtor has no proprietary or other material economic interest except for possession as a mere bailee, or (b) to bar a sovereign state from enforcing its grain laws in state courts against bankruptcy trustees, where enforcement would not impact adversely against any bankruptcy law policy?

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—v.—

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Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

This supplemental brief is submitted on behalf of the State of Missouri, et al., Petitioners herein, in support of their Petition, filed on July 8, 1981, requesting that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on April 8, 1981.* In its opinion, now reported in 647 F.2d 768, the Eighth

* Confronted with Respondents' threats of contempt sanctions for Petitioners' good faith actions as government officials, and to avert confrontation between the United States Marshalls and barricading farmers, Appendix, p. A-5, Petitioners sought a writ of prohibition to confine the bankruptcy court to its lawful jurisdiciton. *Ex Parte Republic of Peru,* 318 U.S. 578, 586 (1943); *In re Attorney General of United States,* 596 F.2d 58, 63-64 (2d Cir.), *cert. denied,* 444 U.S. 903 (1979).

Circuit held that the bankruptcy court had jurisdiction over grain deposited for storage with, although *not* owned by, the debtors and that Petitioners were thus barred from enforcing state grain laws as against the bankruptcy trustee of state-regulated warehouse companies that only had a "minute" ownership interest in grain held for storage. Appendix, p. A-11. State enforcement was precluded because the grain laws protected pecuniary interests. Appendix, pp. A-13 to A-15.

Since the filing of the Petition on July 8, 1981, Petitioners learned that the decision below is in basic conflict with recent decisions of both the Second and Fifth Circuits.* Those decisions correctly ruled that governmental units are not disabled from enforcing their police and regulatory power against a debtor or trustee in bankruptcy even though a primary object of such governmental action is to protect the pecuniary interests of the protected class (i.e., the investing public, consumers, or other group within the zone of protection of the non-bankruptcy statute).

The Court of Appeals has held in this case that the jurisdiction of the bankruptcy courts,** as established by 28 U.S.C. § 1471, is so pervasive as to preclude enforcement by Missouri of its grain laws which, like those of 26 other states,*** were enacted in the exercise of its police and regulatory powers to prevent practices injurious to the integrity of the grain industry. Reconciliation of the scope of the jurisdiction of the bankruptcy courts with the jurisdiction of state courts to

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* The Second Circuit's decision in *Commodity Futures Trading Commission* v. *Incomco, Inc.*, 649 F.2d 128 (2d Cir. 1981) was published on July 20, 1981 and the Fifth Circuit's decision in *Securities and Exchange Commission* v. *First Financial Group of Texas*, 645 F.2d 429 (5th Cir. 1981), shortly before.

** The bankruptcy courts were created in 1978 by 28 U.S.C. § 151.

*** Grain laws are in force in the following states:

Alabama, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin and Wyoming.

entertain governmental proceedings to enforce grain laws, is important to the agriculture industry and the free flow of commerce in grain.* This Court has often granted certiorari to review significant questions involving federal-state relations. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *David Ware et al.*, 414 U.S. 117, 119 (1973).**

I. Circuit conflict

By its decision below, the Eighth Circuit held that the express limitation in the bankruptcy law withholding from bankruptcy courts the power to bar enforcement proceedings by governmental units in non-bankruptcy courts, does not apply where the laws to be enforced "primarily relate to the protection of the pecuniary interest in the debtors' property and not to matters of public health and safety." Appendix, p. A-15.

The Eighth Circuit's decision is in basic conflict with the decisions of the Second Circuit in *Commodity Futures Trading Commission* v. *Incomco, Inc., supra.*, 649 F.2d 128 and of the Fifth Circuit in *Securities and Exchange Commission* v. *First Financial Group of Texas, supra*, 645 F.2d 429. These recent decisions in two other Circuits correctly hold that the 1978 bankruptcy legislation has not stripped governmental units of their traditional power to enforce non-bankruptcy laws in non-bankruptcy courts simply because the regulatory goal involves protection of pecuniary interests.

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* Review by this Court is also important in light of another development since the Petition was filed on July 8, 1981: an opinion dated July 24, 1981 in *Marathon Pipeline Company* v. *Northern Pipeline Construction Co.*, Civil 4-80-589, D. Minn., held that 28 U.S.C. § 1471 was an unconstitutional delegation of judicial power to the bankruptcy courts. A direct appeal to this Court has been filed.

** As recently noted by Mr. Justice Rehnquist in his dissenting opinion in *New Jersey* v. *Reading Company, Debtor in Possession*, ____ U.S. ____, 68 L.Ed.2d 310 (1981), few bankruptcy cases have been recently decided on the merits by this Court, unlike cases involving various other more popular legal subjects. The present case, however, poses important issues of bankruptcy law, federal court jurisdiction, constitutional law, and federal-state relations.

In *Commodity Futures Trading Commission* v. *Incomco, Inc.*, the Court ruled that the pendency of a bankruptcy case concerning a debtor company engaged in the commodity futures trading business did not preclude the granting of an injunction to the Commodity Futures Trading Commission in a non-bankruptcy plenary action it filed against the debtor company.* Similarly, the grant of equitable relief to the Securities and Exchange Commission for the protection of the financial interests of the "investing public" was sustained in *Securities and Exchange Commission* v. *First Financial Group of Texas, supra*, 645 F.2d at 438. The Fifth Circuit there upheld the district court's appointment of a temporary receiver for a securities dealer "[i]n order to protect the public welfare—and especially the interests of those who invested with [the debtor]—" 645 F.2d at 439.**

State enforcement actions designed to protect pecuniary interests have been withdrawn by the Eighth Circuit from the scope of the general principle immunizing governmental enforcement proceedings from bankruptcy court jurisdiction. Its decision engrafts an exception as to pecuniary interests onto the jurisdictional statute that is without support in the language of the 1978 bankruptcy legislation, its Congressional history or bankruptcy law policy. It also erroneously characterized grain laws as primarily protecting pecunicary interests. The Court's rationale failed to recognize that state grain laws comprehensively regulate the grain industry to assure the integrity of grain markets. Petitioners' legal and societal interests in enforcing their grain laws thus transcend the pecuniary interest of the grain owners. Nor should the goal of state

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* Even though the relevant non-bankruptcy law had as its objective the protection of the pecuniary interests of the investing public, the Commission's suit to enforce its police power was exempt from the automatic stay of the Bankruptcy Code. 649 F.2d at 133.

** It has also been recently held that the jurisdiction of the bankruptcy courts does not to extend to the National Labor Relations Board, which deals principally with *pecuniary* relations between employers and employees. *National Labor Relations Board* v. *Evans Plumbing Company*, 639 F.2d 291 (5th Cir. 1981).

grain laws be subordinated to the purely pecuniary, non-constitutional, right of warehouse operators to seek bankruptcy relief. *United States* v. *Kras*, 409 U.S. 434, 437 (1973).

Certain provisions in the 1978 bankruptcy legislation explicitly *withheld* jurisdiction from the bankruptcy courts to bar enforcement by governmental units of their police and regulatory powers in non-bankruptcy courts. 28 U.S.C. § 1478 and Bankruptcy Code §§ 362(b)(4) and 362(b)(5).* The House Judiciary Committee's report relating to the 1978 bankruptcy legislation establishes that governmental units were intended to retain their power to enforce their laws designed to afford "consumer protection" as well as those designed to guard against "fraud" and to provide protection under "similar police or regulatory laws." H. Rep. 95-595, p. 343. These categories included a variety of governmental proceedings involving protection of pecuniary interests. These conclusions are not affected by a statement by one Congressman, relied on by the Court below, that the immunity of governmental units from bankruptcy court jurisdiction does not extend to actions to protect a pecuniary interest in property of the debtor or the estate. Appendix, p. A-14. That statement related only to property owned by the debtor or the estate; in this case only a "minute" portion of the grain was so owned. Appendix, p. A-11. Further, as stated by this Court: "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corporation* v. *Brown*, 441 U.S. 281 at 311 (1979). Accord, *Duplex Printing Press Company* v. *Deering*, 254 U.S. 460, 474 (1921); *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969). In accordance with the Judiciary Committee's intent not to enable a government to enforce a money judgment against a bankrupt, H. Rep. 95-595, p. 343, this statement explained that a government unit's *own* pecuniary rights could not be enforced against property of the debtor or the

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* The endorsement by the 1978 bankruptcy legislation of governmental power to enforce non-bankruptcy laws in non-bankruptcy courts was a re-enactment of a time-honored principle. *Palmer* v. *Commonwealth of Massachusetts*, 308 U.S. 79 (1939); *In re Teltronics*, 649 F.2d 1236 (7th Cir. 1981).

estate. The statement also was at variance with the much broader exemption for governmental units contemplated by the full Committee. H. Rep. No. 95-595, p. 343.

Review by this Court is necessary to resolve the conflict in the Circuits and to provide guidance both to the bankruptcy courts and governmental officials.*

II. 28 U.S.C. § 1471 was misconstrued below

Review of the decision below is also necessary for the reason that 28 U.S.C. § 1471 was broadly construed by the Court of Appeals in a fashion not warranted by the basic objectives of the bankruptcy laws** and the jurisdiction of the bankruptcy courts should not have been expanded by implication.*** The Court also engrafted on Bankruptcy Code § 541 (dealing with "property of the estate") subject matter jurisdictional consequences that should not be attached to a substantive bankruptcy law. This consequent enlargement of the jurisdiction of the bankruptcy courts is likely to create confusion among bankruptcy judges throughout the nation as to the lawful scope of their power.

The Eighth Circuit's construction of 28 U.S.C. § 1471 erroneously expanded the jurisdiction of the bankruptcy courts:

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* The Eighth Circuit's decision crippling state enforcement of grain statutes has begun to have broader impact. *In re Joe De Lisi Fruit Co.*, CCH Bankr. L. Rep. dated July 16, 1981, ¶ 68,082 (sustaining a stay against the Minnesota Department of Agriculture on the theory that its action was to protect creditors).

** 28 U.S. § 1471 should be construed according to the purposes of bankruptcy legislation as a whole. *Reading Company* v. *Brown*, 391 U.S. 471, at 475 (1968); *Kokoszka* v. *Belford*, 417 U.S. 642, 645-46 (1974). Its basic purposes are two-fold: to enable distribution to the creditors, and to provide the debtor with a fresh start. *Burlingham* v. *Crouse*, 228 U.S. 459 (1913).

*** The bankruptcy courts, as federal courts of limited jurisdiction, *Aldinger* v. *Howard*, 427 U.S. 1, 15 (1976), do not have implied power to bar law enforcement actions in other courts. Further, 28 U.S.C. § 1481 expressly withholds such power.

1. The Court below ruled that "the grain here in question is 'property of the estate' *for jurisdictional purposes*." (Italics added). Appendix, p. A-19. That interpretation of 28 U.S.C. § 1471(e) by the lower court compounds the quandary as to the jurisdiction of the bankruptcy courts because it reads 28 U.S.C. § 1471(e) interchangeably with Bankruptcy Code § 541, a non-jurisdictional provision. 28 U.S.C. § 1471(e) purports to grant exclusive jurisdiction to the bankruptcy courts over the property "of the debtor". By contrast, the Bankruptcy Code, in § 541, defines property of the "estate", not of the "debtor". That distinction was made by this Court in *Reading Company* v. *Brown*, *supra*, 391 U.S. at 481. The lower court, however, both failed to recognize that distinction and confused a substantive bankruptcy concept under § 541 (the "estate") with subject matter jurisdiction under 28 U.S.C. § 1471(e), i.e. "property of the debtor". Under the 1978 bankruptcy legislation, jurisdiction of the bankruptcy courts based on property is predicated solely on the debtor's property, not the estate's. However, the Court below based it on purported property of the estate. It treated as property of the "estate" grain in which the debtors never had any ownership interest, and on that predicate concluded that the estate had a property interest for jurisdictional purposes. This ignored the language of 28 U.S.C. § 1471(e).

2. Property that is not owned by a debtor cannot be property of the estate "for jurisdictional purposes". In this case, the debtors and the trustee had a "minute ownership interest" of only 2.3%. Appendix, p. A-11. The Eighth Circuit apparently considered the trustee's "minute" ownership (2.3%) in the grain as sufficient to change the quality of the debtors' *possessory* interest as a mere *bailee* in the remainder (97.7%) into a real ownership interest of the debtors sufficient to trigger jurisdiction in the bankruptcy court over all ownership and other questions. That analysis was a fiction. A bailee's interest simply is not sufficient to constitute ownership in property, for a bailee has no alienable interest. *Segal* v. *Rochelle*, 382 U.S. 375, 379 (1966); 73 *C.J.S.*, *Property*, § 13, at p. 193; *Collier* v.

California Co., 73 F. Supp. 413, 415 (W.D. La. 1947).* The lower court nevertheless found that the debtors' estates had interests in the grain "sufficient to trigger preliminary jurisdiction," and ruled that this grain was "property of the estates 'for jurisdictional purposes' ". Appendix, p. A-19. Nothing in 28 U.S.C. § 1471 or in bankruptcy laws suggests a concept of "preliminary jurisdiction" or jurisdiction on the basis of something that is *not* property of the debtor.

3. The construction of the pertinent sections of the 1978 bankruptcy legislation by the Court below raises the spectre of unconstitutionality. Petitioners assert a right under the Eleventh Amendment to the Constitution to be immune from proceedings against them in the bankruptcy court designed to bar their enforcement of the Missouri grain laws in the state courts. *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973); *State of Tennessee* v. *Taylor*, 169 F.2d 626 (6th Cir. 1948). 28 U.S.C. § 1471 should not be construed so as to enable the filing of suits against the State of Missouri in a federal bankruptcy court. This Court has often applied the canon of construction that when a statute is ambiguous, it should be construed in a way that will "comport with constitutional limitations" and go "in the direction of constitutional policy". *Regional Rail Reorganization Act Cases*, 419 U.S. 102, at 134 (1972).

4. More light is shed on 28 U.S.C. § 1471 by contrasting it with 28 U.S.C. § 1478 and Bankruptcy Code §§ 362(b)(4) and 362(b)(5), which expressly withhold from bankruptcy courts jurisdiction over governmental actions to enforce their police and regulatory power against a debtor. Bankruptcy court jurisdiction should not have been expanded by implication to bar state enforcement proceedings, particularly where to do so would tend to vest in them jurisdiction to adjudicate unsettled

* It is fundamental that under the bailment contracts covering grain, title does not pass to a trustee in bankruptcy. *In re Wright-Dana Hardware Company*, 211 Fed. 908 (2d Cir. 1914). The 1978 bankruptcy legislation preserved the principle that where the debtor's interest in property is limited, it is no greater in the hands of the trustee. H. Rep. 95-595, p. 368.

questions of state law arising under state statutes. *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 483-84 (1940).

Congressional history shows an intent that the filing of a bankruptcy case should not preclude prosecution of a governmental action designed to provide "consumer protection". H. Rep. No. 95-595, p. 343. Those who deposited grain in the warehouses involved in the present case thereby purchased storage services and were clearly "consumers". If Congress had intended to empower bankruptcy courts to bar state enforcement proceedings designed to protect consumer or proprietary interests, it could have easily said so in the statute. *Davis* v. *Pringle*, 268 U.S. 315, 318 (1925); *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 32 (1959).

5. There is no basis to impute to Congress an intent to empower the bankruptcy courts to exercise pervasive jurisdiction in a manner that would preclude state enforcement of grain legislation. Congress recognized that the bankruptcy power of the United States may restrict the powers of states, but only to the extent necessary "to prevent or prohibit state action that is contrary to bankruptcy policy". S. Rep. No. 95-598, p. 29. See also, *Perez* v. *Campbell*, 402 U.S. 637, at 649 (1971). No action by Petitioners was contrary to any bankruptcy policy. The 1978 bankruptcy legislation should not have been construed to destroy the enforcement powers of Petitioners.*

6. In essence, the Eighth Circuit ruled that although the debtors owned virtually *none* of the grain, the bankruptcy court nevertheless had jurisdiction to adjudicate the competing claims of third parties and to determine which of them owned the grain. However, there is no indication that Congress intended the 1978 bankruptcy legislation to change in any way the basic principle that the bankruptcy courts were without jurisdiction to adjudicate disputes between third parties, except as essential in a given case to administer the debtor's estate. Jurisdiction over disputes between third parties was thus left to

* Indeed, 28 U.S.C. § 959(b) demonstrates Congressional policy that *state* law should apply to trustees and debtors in the absence of a compelling federal policy to the contrary.

the state courts. *First State Bank and Trust Co.* v. *Sand Springs State Bank*, 528 F.2d 350, 353-54 (10th Cir. 1976); *In re Shirley Duke Associates, Debtor*, 611 F.2d 15, 18 (2d Cir. 1979).

7. In the present case, the Court of Appeals construed 28 U.S.C. § 1471 so as to supersede grain laws that had been in force for decades. No federal interest supports such an expansive reading or excuses the destruction of state enforcement powers. The Missouri statutes reflect important state policies designed to maintain the integrity of a major segment of the agricultural industry. In the absence of a federal interest, there should be no different outcome to a controversy "simply because an interested party is involved in a bankruptcy proceeding". *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979). Despite this principle, the bankruptcy proceedings involved here have already operated to deprive the grain owners of their property for one year and raise serious questions as to whether state grain laws afford any protection to grain owners upon a warehouseman's bankruptcy.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court issue a writ of certiorari to the Court of Appeals for the Eighth Circuit and reverse that Court's judgment.

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IN THE

Supreme Court of the United States

October Term, 1981

IN RE STATE OF MISSOURI, et al.,

Petitioners,

—v.—

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS and the HONORABLE CHARLES W. BAKER, et al.,

Respondents.

PETITIONERS' SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This brief calls attention to new cases decided after petitioners' last brief was filed on September 14, 1981.* In *State of Ohio* v. *Mansfield Tire and Rubber Company*, ____ F.2d ____ (6th Cir. 1981), Slip Op. 81-3101, 3 Bankr. L. Rep. (CCH) ¶ 68,356, p. 79,785, September 29, 1981, the Sixth Circuit joined the Second and Fifth** in holding that bankruptcy courts do not have subject matter jurisdiction to bar governmental units—in that case, the State of Ohio and certain of its

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* This brief is filed pursuant to this Court's Rule 22.6.

** The decisions of the Second and Fifth Circuits are discussed in petitioners' supplemental brief dated August 12, 1981, pp. 3-4.

agencies—from enforcing or administering their police and regulatory power, particularly where no significant property interest of the debtor's estate would be affected.*

Unlike the Eighth Circuit's decision in the present case, the Sixth Circuit in *State of Ohio* refused to *imply* that the debtor's estate had any ownership interest in property as a basis for bankruptcy court jurisdiction and ruled that bankruptcy courts lack jurisdiction to bar governmental enforcement proceedings that would not in reality injure or interfere with any property of the debtor's estate.** Contrariwise, the rule of the Eighth Circuit would in substance establish *phantom* ownership interests for the debtor's estate in property of *others* that serve to trigger "preliminary jurisdiction" sufficient for a bankruptcy court to bar enforcement proceedings by duly constituted governmental agencies, despite the absence of any language in the Bankruptcy Code or its Congressional history to support its unprecedented analysis.

Just as there was no interference with any property of the debtor's estate in *State of Ohio, supra,* in the present case no property of the debtors' estates would be interfered with by petitioners' enforcement actions if the bankruptcy court were held to lack jurisdiction. In its decision, the Eighth Circuit specifically acknowledged that the debtors' interest in the grain was "minute" and that the trustee had "presented no documents of title to substantiate his claim of ownership." *In re State of Missouri* v. *U.S. Bankruptcy Court,* 647 F.2d 768, 774 (8th Cir. 1981). While petitioners' enforcement proceedings thus could not interfere with any property of the debtors'

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* The Sixth Circuit specifically ruled that a bankruptcy court lacked jurisdiction to pass on workers' claims for injury and that such jurisdiction was vested exclusively in the applicable state agency and state courts. 3 Bankr. L. Rep. at p. 79,790.

** In *State of Ohio, supra,* the State's exercise of jurisdiction did not interfere with any property of the debtor's estate because the debtor's estate would not be obligated to pay any workers' claims that might be sustained; such claims would by law be subject to satisfaction out of an available statutory insurance fund.

estates, the Eighth Circuit, contrary to the Sixth Circuit's analysis, nevertheless ruled that the bankruptcy court had jurisdiction to bar or regulate Missouri's enforcement proceedings.

The underpinning of the decision below was the Eighth Circuit's unprecedented and unexplained principle of "preliminary jurisdiction", a term not previously used in the law of subject matter jurisdiction. Neither that phrase nor its concept finds any roots in the 1978 bankruptcy legislation, the Bankruptcy Act of 1898, Congressional history or case law. Yet, based on that new phrase, phantom interests of the debtors in bailed grain concededly not owned by these estates were held below to be sufficient to trigger preliminary jurisdiction in the bankruptcy court over a vast quantity of grain never owned by the debtors. 647 F.2d at 774. The Eighth Circuit thus departed from the traditional approach to the issue of bankruptcy court control over governmental enforcement actions exemplified by the Sixth Circuit's very recent decision in *State of Ohio.**

The Court in *State of Ohio* rejected the further contention that, although the *enactment* of workers' compensation laws concededly constituted a valid exercise of a state's police power, the *administration* of such laws did not. The Sixth Circuit thus held that where, as here, the police power supports enactment of a law,** governmental action to implement that law also constitutes "an exercise or extension of the police powers." 3 Bankr. L. Rep. at p. 79,790.

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* The trustee's disingenuous ownership claim was paralleled by his unproven claim for storage charges. Although petitioners had determined that storage charges for the grain deposited with the debtors had been prepaid by the depositors to a date subsequent to the appointment of the bankruptcy trustee in these cases, Pet. A-51, the Eighth Circuit seemed to accord some credence to the trustee's storage charge claim even though, as in the case of the trustee's ownership claim, no documentary or other evidence had ever been presented by the trustee to establish his storage charge claim. 647 F.2d at 774.

** See e.g., *Munn* v. *People of Illinois*, 94 U.S. 113 (1877) as to grain laws. The Eighth Circuit itself acknowledged that grain laws are "regulatory in nature." 647 F.2d at 776.

No real question exists as to the police power status of state grain laws. Nor is there any genuine issue as to whether petitioners' enforcement of their grain laws constituted the enforcement of police or regulatory power. Both courts below even acknowledged that petitioners' efforts were undertaken in good faith. 647 F.2d at 779.

Rather, the Eighth Circuit withheld the immunity traditionally accorded to police power enforcement activities for the reason that it perceived grain laws "primarily [to] relate to the protection of the *pecuniary* interest in the debtors' property and not to matters of public safety and health." (Italics added). 647 F.2d at 776. However, no authority supports that proposition. Many governmental enforcement actions are designed to protect pecuniary rights; the Eighth Circuit's rule would eliminate immunity from bankruptcy court jurisdiction traditionally conferred by Congress in many instances. As noted in *State of Ohio*, the very thrust of which was protection of the pecuniary rights of injured workers, Congress did not, either by the Bankruptcy Act of 1898 or the Bankruptcy Code of 1978, confer jurisdiction on the bankruptcy courts to supersede state tribunals with respect to workers' claims.* Any doubt as to whether pecuniary interests fall outside the scope of the police power is removed by *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25 (1952) where this Court stated that the National Labor Relations Board was the public agent of Congress chosen to enforce back pay awards designed "to vindicate the public policy of the statute." 344 U.S. at 27. The enforcement of clearly pecuniary rights in that case did not

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* Early case law withheld jurisdiction from the courts of bankruptcy to bar enforcement proceedings by state agencies. See e.g., *In re Bay Ridge Inn, Inc.*, 94 F.2d 555, 557 (2d Cir. 1938) (per Hon. A. N. Hand); *Colonial Tavern, Inc.* v. *Byrne*, 420 F.Supp. 44, 45-46 (D. Mass. 1976) where the court, rejecting the argument of debtor's counsel (Professor Vern Countryman of Harvard Law School) stated that governmental immunity was essential to prevent bankruptcy relief from providing an "instantly available, cheap and easy sanctuary from all state regulatory enforcement proceedings."

remove governmental activity to enforce such pecuniary awards from the area of public policy.

The Eighth Circuit's decision in *State of Missouri* and the Sixth Circuit's in *State of Ohio* proceed from fundamentally different starting points. They employed disparate analyses despite the fact that each relied on exactly the same Congressional history and cited substantially the same case law. See *State of Missouri, supra,* 647 F.2d at 775, and *State of Ohio, supra,* 3 Bankr. L. Rep. at pp. 79,789-90.

The Eighth Circuit's analysis creating a phantom property interest for the estate, also conflicts with the approach of the Seventh Circuit in its very recent decision in *Gorenz* v. *State of Illinois Department of Agriculture,* 653 F.2d 1179 (7th Cir. 1981). There, the Court held that a bankruptcy court lacked summary jurisdiction under the former Bankruptcy Act over a claim by a trustee to compel the Illinois Department of Agriculture to turn over the proceeds of the sale of grain. The Seventh Circuit stated that jurisdiction could not "be made to rest solely upon such flimsy documentation" that had been presented by the trustee. 653 F.2d at 1185. Jurisdiction should have been withheld in the present case as well in view of the Eighth Circuit's recognition that "no documents of title to substantiate his claim of ownership" had ever been presented by the trustee. 647 F.2d at 774.

The phantom ownership doctrine announced in the present case is in conflict with the traditional rule under which trustees must establish the debtor estate's ownership by clear and convincing evidence, as required by the Seventh Circuit in *State of Illinois, supra.* In the present case, the amorphous ownership concept applied by the Eighth Circuit was unsupported by any documents and without foundation in any statutory or case law or Congressional history. Review by this Court is thus important to resolve whether bankruptcy courts have jurisdiction to bar enforcement proceedings by governmental units based on a mere *assumption* that the debtor estate has some sort of property interest that would be affected by

governmental enforcement activities, in the absence of proof of a real ownership interest.

Unsubstantiated ownership claims by bankruptcy trustees should not be sanctioned or encouraged. They spawn protracted and costly litigation against governmental units. They delay the distribution to the rightful owners of property not owned by the debtor estate. In these days of governmental austerity and severe budgetary constraints, governmental units should not be forced to maintain costly litigation in order to establish the traditional immunity from bankruptcy court jurisdiction of their activities to enforce their police and regulatory power.

CONCLUSION

For the reasons set forth above, and in their petition, first supplemental brief and reply brief, petitioners respectfully request that this Court issue a writ of certiorari and reverse the Eighth Circuit's judgment.

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STATEMENT OF THE CASE

Respondent/Intervenor, Robert P. Lindsey, Chapter 11 Reorganization Trustee for Cox Cotton Company d/b/a James Grain & Cotton Company, an Arkansas Corporation, and Don James, Robert James, and G. E. James, a general partnership, d/b/a Frisbee Cotton Company and James

Grain & Elevator a/k/a James Gin & Elevator, ("Respondent/Trustee") submits the following as his Statement of the Case in order that this Court may have a better understanding of the factual and legal background of the issues involved.

On August 11, 1980, voluntary Chapter 7 bankruptcy petitions were filed in the United States Bankruptcy Court for the Eastern District of Arkansas ("Bankruptcy Court") by Cox Cotton Company, an Arkansas corporation, d/b/a James Grain & Cotton Company; and, by Don James, Robert James, and G. E. James, a general partnership, d/b/a Frisbee Cotton Company; James Grain & Elevator. The latter two general partnerships operate exclusively and have business operations at Ristine, Caruthersville, Jonesway, Holcomb, and Naylor, Missouri. Prior to the filing of the Chapter 7 petitions on behalf of the two Missouri general partnerships, each was licensed by the Department of Agriculture of the State of Missouri to operate grain warehouses and elevators within that state. Also, on August 11, 1980, Mr. and Mrs. Donald R. James, individually, filed a separate Chapter 7 bankruptcy proceeding as did related and affiliated corporations operating in both Arkansas and Missouri owned and controlled by the James brothers.

Evidence introduced at different court hearings during these proceedings clearly indicates that petitioners herein at least as early as July 21, 1980, knew or should have known of substantial shortages of grain in James elevators at various locations in the State of Missouri operated by the above Missouri general partnerships. Between the dates of July 21, and August 8, 1981, and perhaps earlier, in order to cover at least some of these shortages, substantial movements of grain were made from elevator facilities under the control of the James brothers in Arkansas to

elevator facilities also under their control in the State of Missouri.

On or about August 8, 1981, prior to the commencement of any state court receivership proceedings in the State of Missouri, representatives of petitioners persuaded Donald R., Robert W., and George E. James to execute one or more documents purporting to surrender possession and custody of the Missouri elevators to petitioners. Not until after voluntary Chapter 7 proceedings were filed for the above Missouri debtor partnership entities for which Respondent/Trustee is acting as Trustee did petitioners institute any type of legal proceedings under Missouri's Grain Warehouse Law in the various circuit courts of that state. The initial seizure of the warehouses by petitioners was done without compliance with Chapter 411 of the Revised Statutes of Missouri and in particular in non-compliance with §411.519 of the Missouri Grain Warehouse Law.

On or about August 12, 1980 (the day after the filing of the voluntary Chapter 7 petitions by the Missouri general partnership entities under the control of Respondent/Trustee), approximately five (5) *ex parte* Orders were entered by various circuit courts of the State of Missouri in separate counties wherein the Missouri partnership debtor entities had grain elevator operations. These Orders in identical form appointed the Director of the Department of Agriculture of the State of Missouri (a predecessor of one of petitioners) as state court receiver for each partnership debtor entity and authorized the liquidation of the businesses including the grain inventory allegedly pursuant to the Missouri Grain Warehouse Law and in particular under §411.519 thereof. (A copy of one of the Orders is included in Respondent/Trustee's Appendix.)

On August 15, 1980, Respondent/Trustee, pursuant to

an application made with the Bankruptcy Court was authorized to operate the businesses of the Arkansas and Missouri debtor entities pending further orders of the Court, all as authorized under 11 U.S.C. §721. Thereafter, Respondent/Trustee and the employees of the debtor entities resumed business operations and began to untangle the complex affairs of the debtor entities.

On August 29, 1981, Respondent/Trustee was, after notice and hearing, permitted by the Bankruptcy Court by written Order to assume certain executory contracts entered into by and between the various debtor entities and certain farmers pre-petition so that deliveries of milo and/or grain sorghum in substantial amounts might be compelled by Respondent/Trustee and profits generated for the estates of the debtor entities. The August 29, 1980, Order was entered upon notice to petitioners, was not appealed from, and is now final. (A copy of this Order is included in Respondent/Trustee's Appendix.)

During the months of August and September, 1980, representatives of petitioners made repeated statements to the news media to the effect that the Missouri state court receivership proceedings were instituted in an effort to keep Missouri farmers' grain from being "frozen" in litigation, to "seek to preserve the integrity of Missouri's Grain Warehouse Laws", to prevent Arkansas farmers from sharing in grain stored in Missouri in debtors' warehouses, and to prevent the Bankruptcy Court from exercising exclusive jurisdiction and control over the assets of the debtor entities, including the Missouri grain.

On or about September 3, 1980, one of petitioners, the Attorney General of the State of Missouri, acting through an Assistant Attorney General, filed in the United States Bankruptcy Court for the Eastern District of Arkansas an "Application for Determination of Ownership of Customer-

Owned Assets, for Liquidation of Customer-Owned Assets, and Distribution of the Proceeds." (A copy of the Application is included in Respondent/Trustee's Appendix.) It is very interesting to note that the Application requested that the Bankruptcy Court not only determine ownership of the grain, but liquidate the same and distribute the proceeds as soon as possible in order to take advantage of optimum market conditions; and, further, to prevent deterioration or a loss of the grain and its value. This pleading requested that Respondent/Trustee take immediate affirmative steps to liquidate the grain and distribute the proceeds. In fact, in paragraph ten (10) of the Application, Mr. John G. Runyan, in his capacity as Director of the Missouri Department of Agriculture, (one of the petitioner's predecessor) suggested to the Bankruptcy Court that he had in his employ experts in the field of grain management and regulation and that he was well suited to act as the agent of the Respondent/Trustee or otherwise be of assistance in handling the sale and distribution of the proceeds.

After a confrontation with some of the petitioners and their representatives on or about September 17, 1980, at Poplar Bluff, Missouri, Respondent/Trustee, acting through his duly appointed attorneys, filed on September 23, 1980, under the authority of 11 U.S.C. §363(f) his Complaint to Sell All Grain in Arkansas and Missouri Free and Clear of Liens with all valid liens and/or ownership claims to attach to the net sale proceeds. Prior to and after the filing of the above Complaint by Respondent/Trustee, there occurred an unlawful assembly of farmers who had for their purpose the blockade of the Ristine, Missouri, elevator facility being operated by Respondent/Trustee. On September 15, 1980, pursuant to a previous written Application, the Bankruptcy Court entered an Order granting Respondent/Trustee the assistance of United States Mar-

shals for the Eastern District of Missouri in dissolving the unlawful blockade of farmers at Ristine, Missouri, so that milo deliveries might be made at said facility by farmers who desired to perform their milo delivery contracts with the debtor entities operated by Respondent/Trustee. (A copy of the Order dated September 15, 1980, is included in Respondent/Trustee's Appendix.)

From late August, 1980, until the general election in the State of Missouri on November 4, 1980, the matter of the jurisdictional fight over the Missouri grain became a hotly contested issue in all political races.

In the early fall of 1980, it became apparent to Respondent/Trustee and his counsel and employees that the prime motive behind actions of petitioners in interfering with the jurisdiction of the Bankruptcy Court was to protect the farmers' "pecuniary interest" in the grain alleged to be owned by them and to save (at the expense of the taxpayers of the State of Missouri) said farmers from having to employ private legal counsel. Although petitioners have alleged in proceedings below and in this Court that they have no direct "pecuniary interest" of their own in the Missouri grain, they apparently do attempt in Missouri state court proceedings to recover their legal costs and expenses from the sale thereof should it be established that subject matter jurisdiction over the Missouri grain is vested in the Missouri circuit courts and not in the Bankruptcy Court. So, at least to that extent, petitioners do have a contingent "pecuniary interest" in the grain.

In late September, 1980, the Bankruptcy Court scheduled a hearing for Monday, October 27, 1980, at the U. S. Post Office and Courthouse Building, Little Rock, Arkansas, on the issue as to whether the Arkansas and Missouri grain in the custody and possession of Respondent/Trustee should be sold free and clear of liens. All defendants, num-

bering in excess of three hundred (300), received actual notice of said hearing. Also, on October 20, 1980, was scheduled a hearing on "Trustee's Motion to Dismiss Application for Determination of Ownership of Customer-Owned Assets, et al." filed September 15, 1980, and which also is made a part of Respondent/Trustee's Appendix. Early on the morning of the hearing, the then Director of the Missouri Department of Agriculture and state court receiver, John G. Runyan, caused the pleading filed by him on September 3, 1980, to be dismissed so that his attorneys could institute that same day proceedings in the various circuit courts of the State of Missouri for an immediate seizure of all of the assets of the Missouri partnership entities under the jurisdiction of Respondent/Trustee and the Bankruptcy Court and for an injunction against Respondent/Trustee and his attorneys and agents from in any way interfering with said proceedings in the circuit courts of the State of Missouri. A copy of the Petition and Show Cause Order filed and entered on October 20, 1980, *ex parte,* is made a part of Respondent/Trustee's Appendix.

At approximately 2:00 p.m., Monday, October 20, 1980, said pleadings were delivered to the offices of Ben F. Arnold, one of the duly appointed attorneys for Robert P. Lindsey, Trustee, by a representative of one of petitioner's predecessor, John G. Runyan, in his capacity as Receiver and Director of the Missouri Department of Agriculture. Upon obtaining a copy of said pleadings, and having read the same, Trustee and his counsel informed the Honorable Charles W. Baker, Bankruptcy Judge, of the existence of the proceedings and indicated to Judge Baker that a Petition for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and Contempt Citation against appellants would shortly be thereafter filed in the Bankruptcy Court and that said matter should be brought

on for hearing on a preliminary basis as soon as practicable with whatever notice as might be appropriate. Respondent/ Trustee is unaware of the nature and subetance of any phone conversations between the Honorable Charles W. Baker, Bankruptcy Judge, and Mr. James F. Gunn, one of the attorneys of record for appellants, in proceedings before the Bankruptcy Court. However, Respondent/ Trustee, upon information and belief, has reason to believe that matters set for hearing and determination before Respondent, Honorable Charles W. Baker, Bankruptcy Judge, on Wednesday morning, October 22, 1980, concerned whether a show cause order should be issued with respect to contempt matters and whether the defendants to said proceeding would be required to answer the Respondent/ Trustee's charges within a later determined period of time; and, as to whether a temporary restraining order should be issued pending further proceedings before Judge Baker for a preliminary injunction. That it was never the intent and purpose of any communications from Respondent, Honorable Charles W. Baker, Bankruptcy Judge, to Mr. James F. Gunn to put petitioners to trial on the merits on such short notice. However, under the circumstances, some action had to be taken by Respondent/Trustee since the hearing as to whether he should be authorized to sell all grain in Arkansas and Missouri free and clear of liens was scheduled for hearing and trial before Judge Baker at 10:00 O'Clock a.m. Monday, October 27, at Little Rock. The parties and their counsel were entitled to know whether the hearing would go forward or be continued. Out of state witnesses had been subpoenaed for the hearing.

Instead of seeking writs of prohibition in the Eighth Circuit Court of Appeals on October 21, 1980, and December 22, 1980, petitioners had other legal remedies available to them. They could have moved the Bankruptcy Court for a continuance even on preliminary matters relative to the

Trustee's Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and Contempt Citation. Petitioners could have sought intervention and moved for a continuance or dismissal for lack of the Bankruptcy Court's jurisdiction on the initial hearing on Respondent/Trustee's Complaint to Sell all Grain Free and Clear of Liens scheduled for 10:00 a.m. October 27, 1980. Petitioners chose not to seek a motion for continuance or dismissal in either proceeding although being on actual notice of the hearings. Petitioners could have sought from the Bankruptcy Court its abstention from each proceeding pursuant to the terms of 28 U.S.C. §1471(d). If the Bankruptcy Court had entered an order abstaining from either of said proceedings, the order would not have been reviewable by appeal or otherwise. Also, under 11 U.S.C. §305, petitioners could have asked the Bankruptcy Court to abstain from all proceedings relative to the Missouri general partnership debtor entities and any other debtor entity having operations within the State of Missouri. Also, petitioners could have asked that certain of the proceedings dealing with Missouri grain be transferred under grounds of *forum non conveniens* to the United States Bankruptcy Court for the Eastern District of Missouri for further proceedings. Finally, petitioners at all times herein mentioned had the right of appeal from any adverse order of the Bankruptcy Court to the United States District Court for the Eastern District of Arkansas and to the Eighth Circuit Court of Appeals. Therefore, proceedings for writs of prohibition were not then and are not now appropriate as other adequate legal remedies have always been available to these petitioners.

On October 21, 1980, the United States Court of Appeals for the Eighth Circuit entered an Order denying petitioners' Petition for Writ of Prohibition without prejudice but staying all proceedings in the Bankruptcy Court

in all cases in which Respondent/Trustee was acting pending the filing by petitioners of a Petition for Writ of Prohibition with the United States District Court for the Eastern District of Arkansas on or before October 30, 1980. Late in the afternoon of October 30, 1980, a Petition for Writ of Prohibition with exhibits and a supporting brief was in fact filed in the United States District Court for the Eastern District of Arkansas. Thereafter, on December 2, 1980, after briefs were filed by various parties and intervenors, and after oral argument was heard, the United States District Court for the Eastern District of Arkansas entered its Memorandum Opinion and Order upholding the exclusive subject matter jurisdiction of the Bankruptcy Court over the Missouri grain. A copy of the December 2, 1980 Memorandum Opinion and Order of the Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas, is included in petitioners' Appendix. At the hearing before the United States District Court on November 17, 1980, Respondent/Trustee was permitted to intervene as a party-respondent in proceedings on petitioners' Petition for Writ of Prohibition. Also, in excess of forty (40) individual Arkansas farmers represented by the Honorable Bill W. Bristow, Attorney at Law, Jonesboro, Arkansas, were allowed to intervene as parties-respondents in said proceedings. Orders authorizing the interventions are included in Respondent/Trustee's Appendix.

Upon it having been determined that subject matter jurisdiction over the Missouri grain was vested in the Bankruptcy Court, the Respondent Bankruptcy Judge of that Court once again set for hearing and trial on December 23, 1980, the question as to whether the Arkansas and Missouri grain should be sold by Respondent/Trustee free and clear of liens with all valid liens and/or ownership claims, if any, to attach to the net sale proceeds. Notice

was mailed to all defendants, creditors, and all attorneys of record. However, on December 22, 1980, petitioners filed a second Petition for Writ of Prohibition in the United States Court of Appeals for the Eighth Circuit seeking a stay order of all proceedings in the Bankruptcy Court pending further proceedings in the Eighth Circuit Court of Appeals. A second *ex parte* general stay order was entered by the Eighth Circuit Court of Appeals enjoining all pending proceedings (whether or not related to issues over the subject matter jurisdiction of the Missouri grain) pending an expedited briefing schedule, oral argument, and a decision on the merits by the Eighth Circuit Court of Appeals. Other critical matters in the Chapter 11 reorganization cases for Respondent/Trustee's debtor entities had also been set for hearing on December 23, 1980, but were also stayed, although having no relation to the jurisdictional dispute over the Missouri grain.

Thereafter ensued repeated attempts by petitioners, Respondent/Trustee, and their counsel to negotiate some acceptable settlement with respect to not only the jurisdictional issues involving the Missouri grain, but a settlement on the merits with respect to all adverse claims to that grain. Settlement negotiations continued until mid-February, 1981, when it became apparent that further negotiations would not be fruitful. Thereafter, the jurisdictional issues were thoroughly briefed by counsel for petitioners and the various respondents and the matter was orally argued on March 11, 1981.

On April 8, 1981, the United States Court of Appeals for the Eighth Circuit entered its Memorandum Opinion and Order upholding the exclusive subject matter jurisdiction of the Bankruptcy Court over the Missouri grain. The Memorandum Opinion and Order dated December 2, 1980, of the Honorable George Howard, Jr., United States Dis-

trict Judge for the Eastern District of Arkansas, was affirmed, and the second Writ of Prohibition filed by petitioners in the Eighth Circuit Court of Appeals was dismissed. Petitioners did not seek a stay order from the Eighth Circuit Court of Appeals with respect to the operative effect of its Memorandum Opinion and Order. Upon information and belief, no stay order was sought from this Court seeking to hold in abeyance the operative effect of the April 8, 1981, Memorandum Opinion and Order of the Eighth Circuit Court of Appeals.

Between the dates of September 23, 1980 (the date Respondent/Trustee commenced his adversary proceeding to sell all grain in debtors' elevators in Missouri and Arkansas free and clear of liens), and April 8, 1981 (the date of the Memorandum Opinion and Order of the United States Court of Appeals for the Eighth Circuit upholding the subject matter jurisdiction of the Bankruptcy Court over the Missouri grain), the fair market price of No. 2 yellow soybeans declined in value from approximately $9.50 per bushel to approximately $7.00 per bushel. Respondent/Trustee estimated that approximately 164,992 bushels of soybeans were located in Respondent/Trustee's elevators in the State of Missouri at the various locations. Similarly, the fair market value of milo and/or grain sorghum was likewise declining during this period which caused further diminution in the value of the assets of the debtor entities. Respondent/Trustee estimated that approximately 1,071,604 bushels of milo were in inventory at the different locations. Respondent/Trustee also had information during this period of time that the quality and condition of the grain in his Missouri elevators were deteriorating substantially due to the presence of insects, "hot spots", and other detrimental agents. Respondent/Trustee also estimated that funds from the sale of the Missouri grain could be invested at interest rates anywhere from 13% to 15.5% per

annum upon the grain being sold, unloaded, delivered, and settlements made with grain purchasers. Also, it was obvious to Respondent/Trustee that administrative costs in caring for, preserving, and protecting the grain in the nature of Trustee's fees, attorneys' fees, accounting fees, professional expenses, office overhead, trucks and fuel, travel, chemicals, preservatives, insurance, manual labor, and rent charges could be diminished and essentially eliminated upon the grain being sold free and clear of liens under 11 U.S.C. §363. Finally, it was apparent that storage charges were accruing daily which would have to be assessed against the owners and/or lien claimants to the grain thereby reducing their ultimate distribution.

Shortly after the Memorandum Opinion and Order dated April 8, 1981, of the United States Court of Appeals for the Eighth Circuit was entered, Respondent/Trustee requested of the Bankruptcy Court that once again the issue as to whether the Missouri grain should be sold free and clear of liens by Respondent/Trustee should be scheduled for hearing and trial. On or about February 4, 1981, the Bankruptcy Court had previously determined pursuant to notice and hearing that the Arkansas grain should in fact be sold free and clear of liens under appropriate safeguards and protective orders. A copy of the February 4, 1981, Order Authorizing Trustee to Sell the Arkansas Grain Free and Clear of Liens is included in Respondent/Trustee's Appendix.

On April 21, and May 8, 1981, pre-trial conferences were held by the Respondent Bankruptcy Judge with various attorneys concerning the legal and factual issues, complexities, and problems of proof to be presented at the hearing and trial on the issue as to whether the Missouri grain should be sold free and clear of liens. Pursuant to a carefully drawn pre-trial Order (a copy of which is included

in Respondent/Trustee's Appendix), the hearing and trial began at the U. S. Post Office and Courthouse Building, Little Rock, Arkansas, on May 18, and May 19, 1981. After one and one-half days of testimony, on May 27, 1981, Bankruptcy Court entered its Memorandum Opinion and separate Orders authorizing Trustee to sell all grain situated in his debtors' elevators in the State of Missouri free and clear of liens. A copy of the Memorandum Opinion and one of the separate Orders of the Bankruptcy Court are included in Respondent/Trustee's Appendix. Said Orders were not appealed from by any party and are now final.

Upon the time for appeal having passed from the May 27, 1981, Orders of the Bankruptcy Court Respondent/Trustee widely sought bids from various grain purchasers for the sale of all the Missouri grain. On June 24, and July 2, 1981, written contracts were entered into by and between Respondent/Trustee and Bearhouse, Inc. for the purchase and sale of the Missouri grain. Copies of these contracts are included in Respondent/Trustee's Appendix.

Substantial performance has already occurred under the terms and provisions of said contracts. Considerable quantities of grain (soybeans, milo and/or grain sorghum, corn, and wheat) have already been unloaded and removed from the various elevators under the legal control of Respondent/Trustee. It was estimated under the contracts that approximately ninety (90) days would be sufficient for full performance on and after July 13, 1981. Due to certain civil commotions, blockades, and threats against one or more of the elevators under the control of Respondent/Trustee, said period may have to be extended slightly. Substantial funds have already been received and invested by Respondent/Trustee from the sale of the Missouri grain. Under the May 27, 1981, Orders of the Bankruptcy Court, Respondent/Trustee was ordered to invest said funds in

one or more interest bearing certificates of deposit pending a determination of the exact ownership and/or lien claims to the grain.

It is at once apparent that the question of jurisdiction over the Missouri grain as a practical matter is now moot since under the April 8, 1981, Order of the Eighth Circuit Court of Appeals, exclusive subject matter jurisdiction has been established in the Bankruptcy Court. Missouri grain sale operations have been commenced; and, a substantial amount of the grain already has been unloaded and sold. Respondent/Trustee submits that petitioners at this late stage of this jurisdictional dispute have no good and practical reason to seek any relief from this Court as operations and liquidation of the assets of the debtor entities by Respondent/Trustee are well in process of being fully consummated.

RESPONDENTS' REASONS FOR NOT GRANTING THE WRIT

Pursuant to Rule 17 of the Rules of this Court, Respondent/Trustee and Respondents/Intervenors Gary Hart, et al. ("Arkansas Farmers") submit the following are valid and appropriate reasons why the Writ should not be granted:

1. *The jurisdictional issues discussed in Petitioners' Petition for Writ of Certiorari are moot.*

Without question, petitioners have failed to request stay orders from either this Court or the Court of Appeals for the Eighth Circuit with respect to the Memorandum Opinion and Order entered on April 8, 1981, by the Eighth Circuit Court of Appeals. Petitioners utilized almost the entire ninety (90) day period as prescribed by Rule 20 of this Court and 28 U.S.C. §2101(c) within which to file their Petition for Writ of Prohibition, Brief, and Appendix.

During this period of time, Respondent/Trustee and the other respondents herein (appellees below in the Eighth Circuit Court of Appeals) had every reason to believe that no further legal proceedings would be instituted in this or in any other court questioning further the exclusive subject matter jurisdiction of the Bankruptcy Court over the Missouri grain. Petitioners did not seek to intervene in or appear at the hearings on May 18 and 19, 1981, in the Bankruptcy Court concerning the issue as to whether the Missouri grain should be sold free and clear of liens and, if so, by what method and safeguards. Neither petitioners nor any party took an appeal from the May 27, 1981, Memorandum Opinion and Orders of the Bankruptcy Court authorizing Respondent/Trustee to sell all of the Missouri grain free and clear of liens. No attempt was made to post any type of stay bond. Prior to filing their Petition for Writ of Certiorari in this Court, petitioners did not indicate in any way or manner to Respondent/Trustee that further proceedings would be instituted regarding the exclusive jurisdiction of the Bankruptcy Court over the Missouri grain. As mentioned above, Respondent/Trustee has now sold under contract all of the Missouri grain, a substantial amount of which has already been unloaded, transported, and cash funds received and invested by Respondent/Trustee. Unloading and shipment of grain are currently proceeding smoothly except at one location in Missouri. In addition, Respondent/Trustee is attempting to lease and/or sell the various elevator facilities owned by the debtor entities in the State of Missouri. There are no ongoing new business operations (grain or otherwise) of the debtor entities at these locations requiring in any manner a license or licenses to be issued by the State of Missouri to Respondent/Trustee. There are no continuing operations such as buying and selling grain, deferred pricing contracts, storage of new crop grain, and the like requiring

intervention in any particular by petitioners. There are simply no ongoing business operations which need to be regulated, supervised, licensed or even monitored by petitioners. The public health, safety, and welfare of the citizens of the State of Missouri are not and never have been in jeopardy as a result of Respondent/Trustee performing the duties imposed upon him by previous Orders of the Bankruptcy Court under the United States Bankruptcy Code. It is anticipated by Respondent/Trustee that all real property and other personal property of these Missouri general partnerships will be liquidated and sold under the terms of a liquidation type Plan of Reorganization to be filed in the immediate future. Even should this Court grant petitioners' Petition for Writ of Certiorari and on the merits determine that the United States Court of Appeals for the Eighth Circuit has erred in its decision on subject matter jurisdiction over the Missouri grain, nevertheless, due to the passage of time and intervening events, nothing substantively will have been accomplished for the benefit of any creditor except further unnecessary expenditures of professional time and money which will not benefit the unsecured creditors of the debtors' estates. Respondent/Trustee is already doing what petitioners seek to do. Prior litigation over the jurisdictional issues related to the Missouri grain have already cost the creditors of the debtor entities several thousands of dollars which never will be recouped. This Court should not sanction a further drain of the cash resources of these debtor entities to the economic disadvantage of these unfortunate creditors.

2. *The Memorandum Opinion and Order of the Eighth Circuit Court of Appeals is not in conflict with the decision of another federal court of appeals on the same matter.*

To the best of the knowledge, information and belief of Respondent/Trustee and his counsel, the decision of

the Eighth Circuit Court of Appeals as to the jurisdictional effect of 11 U.S.C. §362 and in particular 11 U.S.C. §362(b)(4) is the first such decision of a federal court of appeals on said matter. Although other bankruptcy courts have determined the same issue under different facts, appeals, if any, from their decisions have not yet reached another federal court of appeals. Therefore, there is no conflict among the circuit courts of appeals on this issue and, thus, no valid, special, and important reason why the interpretation of this provision of the Bankruptcy Code should be considered by this Court at this time.

3. *The decision of the Eighth Circuit Court of Appeals is not in conflict with any applicable decision of this Court.*

As early as 1903, this Court had an opportunity to comment on the supremacy of the bankruptcy laws over state receivership proceedings involving the liquidation of debtors' estates pursuant to Article 6, Clause 2 of the Constitution of the United States. *In Re: Watts,* 190 U.S. 1, 23 S.Ct. 718, 47 L.Ed. 933, this Court at page 724 said:

> "And the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the Federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily, when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession, or of possession and enforcement of pre-existing liens, or in aid of the bankruptcy proceeding. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from

him without the court's consent, by the receiver of another court appointed in a subsequent suit; but, that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent."

In the above case, this Court clearly held that the Bankruptcy Court had exclusive jurisdiction under the supremacy clause of the United States Constitution over state receivership proceedings involving the liquidation of the debtors' estates and property. This Court's decision in the *Watts* case, supra, was reaffirmed in the case of *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 51 S.Ct. 270, 75 L.Ed. 645 (1931). In that landmark case, this Court held that the Bankruptcy Court had exclusive jurisdiction to deal with the property of the bankrupt's estate including the ordering of a sale of real property lying outside the district. This Court also held that when jurisdiction once attaches, the Court's possession of the jurisdiction cannot be affected by actions brought in other courts, citing *White* v. *Schloerb*, 178 U.S. 542, 20 S.Ct. 1007, 44 L.Ed. 1183; *Murphey* v. *John Hofman Co.*, 211 U.S. 562, 29 S.Ct. 154, 53 L.Ed. 327; and *Dayton* v. *Stanard*, 241 U.S. 588, 36 S.Ct. 695, 60 L.Ed. 1190.

This Court recently had another occasion to reaffirm the effect of the supremacy clause of the United States Constitution with respect to the jurisdiction of bankruptcy courts over state proceedings. In the case of *Perez, et ux.* v. *Campbell, Superintendent*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971), this Court held that a provision of the Arizona Motor Vehicle Safety Responsibility Act was in direct conflict with §17 of the Bankruptcy Act and, therefore, was unconstitutional as being in violation of the supremacy clause. In that case, the State of Arizona sought to impose a different discharge provision than that legis-

lated by the United States Congress under §17 of the now repealed Bankruptcy Act.

Therefore, it has been well settled by this Court beyond any doubt that a bankruptcy action preempts state court insolvency proceedings. The above cases stand for the proposition that the bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations, is essentially exclusive.

It is also interesting to note that petitioners fail to point out in their Petition for Writ of Certiorari that even if the State of Missouri's own liquidation proceedings in Missouri state courts come within the exception to 11 U.S.C. §362(a) as set forth in 11 U.S.C. §362(b)(4), nevertheless the Bankruptcy Court can take appropriate steps to protect its jurisdiction over assets of the estate, regardless of whether a proceeding falls within the section 362(b)(4), by issuing any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title as authorized by 11 U.S.C. §105(a). Therefore, even a favorable determination by this Court on the merits as to the applicability of §362(b)(4) after the petition for writ of certiorari has been granted will avail petitioners of nothing since at these late stages in these Chapter 11 proceedings for these debtor entities, the United States Bankruptcy Court for the Eastern District of Arkansas will undoubtedly retain jurisdiction by entering an appropriate order under 11 U.S.C. §105(a). See *In Re: Shippers Interstate Service, Inc.*, 618 F.2d 13; *In Re: Bel Air Chateau Hospital, Inc.*, 611 F.2d 1251; *In Re: W. F. Hurley, Inc.*, 553 F.2d 1096; *In Re: Saugus General Hospital, Inc.*, 19 C.B.C. 651 (D.Mass. 1978); *Stout* v. *Green*, 131 F.2d 995 (1942); *Duggan* v. *Sansberry*, 327 U.S. 499 (1946); *Schatzman, Trustee* v. *Department of Health, et al.*, 2 C.B.C.2d 639 (S.D.

Florida, 1980); and *The Seeburg Corp.* v. *NLRB*, 2 C.B.C. 2d 880 (N.D. Ill., 1980).

Respondent/Trustee further submits that the legislative history fully discussed in the Memorandum Opinion and Order of the United States Court of Appeals for the Eighth Circuit made part of petitioners' Appendix and other cases cited in that Memorandum Opinion and Order leave absolutely no doubt of the correctness of that decision. The Bankruptcy Court clearly has jurisdiction over all the property of the debtors under 28 U.S.C. §1471, 28 U.S.C. §1481, and 11 U.S.C. §541. There is simply no compelling, appropriate, or desirable reason why this Court should issue its writ of certiorari to review the decision of a lower federal court so plainly correct as to leave really no substantial doubt as to its validity. In this jurisdictional area which is already well settled, the 1978 Bankruptcy Reform Act made no significant changes in prior bankruptcy law. If anything, the jurisdiction of bankruptcy courts is broadened and clarified. Therefore, there is no need for this Court to review the decision of the United States Court of Appeals for the Eighth Circuit.

4. *There are no special and important reasons for granting the Petition for Writ of Certiorari.*

The decision of the Eighth Circuit Court of Appeals in no way limits, restricts, or prohibits the enforcement by petitioners of legitimate public health, consumer protection, and safety laws and regulations of the State of Missouri. These areas of enforcement are in no way affected by the decision of the Eighth Circuit Court of Appeals and are not within the automatic stay provisions of 11 U.S.C. §362. Factually, petitioners seek to infringe upon the traditional functions of bankruptcy courts in liquidating debtors' estates. As above stated, these functions traditionally have been vested in bankruptcy courts to the exclusion of state

regulatory authorities. Petitioners will still be allowed to exercise reasonably their police power consistent with the holdings of this Court in *Penn Central Transportation Co.* v. *City of New York,* 98 S.Ct. 2646 (1978); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960); *Miller* v. *Schonee,* 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); and *Lawton* v. *Steele,* 152 U.S. 133 (1894). But when state regulation in the name of its police power takes the form of seizure of property of bankrupts' estates and their attempted liquidation, the police or regulatory power is no longer being exercised consistent with 11 U.S.C. §362(b)(4). A governmental unit clearly may not act to protect a pecuniary interest in property of the Debtor or property of the estate. (95 Cong. Rec. H11092 and S17409) The factual distinctions in this case from others above cited do not justify this Court in granting petitioners Petition for Writ of Certiorari.

CONCLUSION

Petitioners have asserted no special or important reason why this Court at this time should review by issuance of a writ of certiorari a clearly correct decision of a lower federal court, not in conflict with any decision of another court of appeals or of this Court. Jurisdiction over the Missouri grain and Respondent/Trustee's operations in the State of Missouri was established many months ago in the Bankruptcy Court and the jurisdictional issues raised by petitioners in this Court are now moot. Respondent/Trustee and Arkansas Farmers respectfully requests that the Petition for Writ of Certiorari be denied.

DATED at Little Rock, Arkansas, this 10th day of August, 1981.

Respectfully submitted,
Respondents/Intervenors GARY HART, *et al.*
("Arkansas Farmers")

By Their Attorney:
BILL W. BRISTOW, ESQ.
Seay & Bristow
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Jonesboro, AR 72401
and
ROBERT P. LINDSEY, Respondent/Chapter 11 Reorganization Trustee for Cox Cotton Company d/b/a James Grain & Cotton Co.; and Don James, Robert James and G. E. James, a general partnership, d/b/a Frisbee Cotton Company; James Grain & Elevator

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and

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By: _____
Ben F. Arnold

Attorneys for Respondent/Trustee

APPENDICES

APPENDIX A

IN THE

CIRCUIT COURT OF RIPLEY COUNTY, MISSOURI

STATE OF MISSOURI ex rel. JOHN G. RUNYAN, Director of the Missouri Department of Agriculture, *Relator,* v. DONALD R. JAMES, ROBERT W. JAMES and GEORGE JAMES, d/b/a JAMES GIN & ELEVATOR COMPANY, located at Naylor, Missouri, *Respondents.*	Case No.

PETITION FOR APPOINTMENT OF RECEIVER

COMES NOW the State of Missouri at the relation of John G. Runyan, Director of the Missouri Department of Agriculture, by and through its attorneys, John Ashcroft, Attorney General of Missouri, and Gerald M. Sill, Assistant Attorney General, and for its cause of action states:

1. Relator, John G. Runyan, is the duly qualified, appointed and acting Director of the Missouri Department of Agriculture. The Missouri Department of Agriculture was created by Section 261.010, RSMo 1969. The office of the Commissioner of Agriculture was created by Section 261.020, RSMo 1969, and the duties and powers of the Commissioner are transferred to the Director of the Department of Agriculture pursuant to Section 2 of the Omnibus State Reorganization Act of 1974.

2. The Director of the Missouri Department of Agriculture is responsible for the implementation, administra-

tion and enforcement of the "Missouri Grain Warehouse Law", Sections 411.010 to 411.765, RSMo 1978. Pursuant to the provisions of the Missouri Grain Warehouse Law, relator issues licenses allowing the operation of public grain warehouses in Missouri as defined by Section 411.026(20) and causes the examination and audit of the quantity, quality and grade of grain stored in said licensed grain warehouses.

3. Respondents are partners operating a public grain warehouse located in Naylor, Ripley County, Missouri, and having License No. P-UR-108 issued by the Missouri Department of Agriculture.

4. Section 411.519, RSMo 1978, authorizes the Director of the Missouri Department of Agriculture, when he has evidence that a warehouseman is insolvent, to petition the circuit court for the appointment of a receiver to operate or liquidate the business of the warehouseman in accordance with law.

5. On or about August 6, 1980, the Director of the Missouri Department of Agriculture received a mailgram indicating that respondents intend to file bankruptcy and impliedly are insolvent.

6. In accordance with the authority granted in such circumstances by the aforesaid Section 411.519, the only remedy available is for the appointment of a receiver to take possession of the public grain warehouse to operate or liquidate the warehouse in accordance with laws as may be appropriate.

WHEREFORE, relator prays the court:

1. That the Director of the Missouri Department of Agriculture be appointed as receiver for respondents' public grain warehouse.

2. That, after doing a complete audit and investigation

as appropriate, the receiver liquidate or operate said business as may be deemed most appropriate to protect the interests of individuals storing grain in said public grain warehouse.

3. For such other further relief as may be proper and necessary.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

GERALD M. SILL
Assistant Attorney General
MBE#20843
P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321
Attorneys for Relator

EXHIBIT "A"

Professional Business Management
5307 East Mockingbir Ln
Dallas TX 75206

4-019894S219003 08/06/80 ICS IPMBNGZ CSP KCMB
2 2148274210 MGM TDBN Dallas Tx 08-06 1127A EST

Missouri Department of Agriculture, Attn
Holger Danielsen
PO Box 630
Jefferson City MO 65102

This is a confirmation copy of a previously phone-delivered telegram

Reference: Cox Cotton Company, James Grain and Cotton Company, Frisbee Cotton Company, James Gin and Elevator Company, James Agri-Center, Inc., James Farm Center, Inc., Don James, G. E. James, Robert James

Please be advised this office has been retained to represent the above-entitled companies and individuals in all legal matters relating to impending bankruptcy proceedings. Direct all inquiries to this office.

Warren E. Zimmerman and Cecil Emerson
214-827-4210 Suite 710 Capital Bank Bldg
5307 East Mockingbird Ln Dallas TX 75206

11:27 EST

MGMCOMP MGM

STATE OF MISSOURI }
COUNTY OF COLE }

I, Tommy D. Hopkins, being duly sworn, state that I am the coordinator of Grain Regulatory Services for the Missouri Department of Agriculture, that I have read the foregoing petition and that the facts contained therein are true to the best of my knowledge and belief.

Tommy D. Hopkins

Sworn to and subscribed before me this _____ day of August, 1980.

Notary Public

My Commission Expires:

IN THE

CIRCUT COURT OF RIPLEY COUNTY, MISSOURI

STATE OF MISSOURI ex rel. JOHN G. RUNYAN, Director of the Missouri Department of Agriculture, *Relator,* v. DONALD R. JAMES, ROBERT W. JAMES and GEORGE JAMES, d/b/a JAMES GIN & ELEVATOR COMPANY, located at Naylor, Missouri, *Respondents.*	Case No.

ORDER APPOINTING RECEIVER

The petition of relator for the appointment of a receiver having been reviewed and duly considered under the circumstances, it is

ORDERED that John G. Runyan, Director of the Missouri Department of Agriculture, be appointed as receiver in accordance with Section 411.519.6, RSMo 1978, of respondents' public grain warehouse located in Naylor, Ripley County, Missouri, and under License No. P-UR-108 issued by the Missouri Department of Agriculture; and it is

FURTHER ORDERED that the receiver make an audit and full investigation of the financial circumstances of respondents and carry out such operation or liquidation of said public grain warehouse in order to protect the best interests of those individuals storing grain in said facility.

/s/ Rex H. Henson
Judge, Circuit Court of Ripley County

Dated: 8/12/80

Date 8/14/80

1. Court: Circuit Court of Ripley County
2. Case Number: CV 480-101 CC
3. Full style of case (including court and case number of original jurisdiction, if appellate case): State ex rel. John G. Runyan, Director of the Missouri Department of Agriculture, Relator, v. Donald R. James, Robert W. James and George James, d/b/a James Gin & Elevator Company
4. Type of litigation: Petition for Appointment of Receiver
5. Litigation type code number (see attached list): 660
6. Names of all parties involved in case, including code (AAG, AG, APE, ATA, ATD, ATP, ATR, ATY, DEF, INT, JUD, LS, PA, PLF, REL, RSP*) and appropriate comments with regard to each name such as address, phone:

Last Name	First Name & Initial		Code	Miscellaneous Information
James	Donald	E	DEF	
James	Robert	W	DEF	
James	George		DEF	
State ex rel. Runyan			PLF	

7. Listing of known docket entries and response dates, if any:
   Petition for Appointment of Receiver 8/12/80
   Order for Appointment of Receiver 8/12/80
8. Signature of AAG assigned to case:

---

*AAG—Asst. Atty. Gen.; AG—Atty. Gen.; APE—Appellee; APL—Appellant; ATA—Atty. for Apellant; ATD—Atty. for Def.; ATP—Atty. for Plf.; ATR—Atty. for Rel.; ATY—Atty.; DEF—Defendant; INT—Intervenor; JUD—Judge; LS—Law Student; PA—Pros. Atty.; PLF—Plaintiff; REL—Relator; RSP—Respondent.

APPENDIX B

IN THE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE: COX COTTON COMPANY d/b/a JAMES GRAIN & COTTON CO. *Debtor*	NO. J-80-154 B
IN RE: DON JAMES, ROBERT JAMES and G. E. JAMES, a general partnership, d/b/a FRISBEE COTTON COMPANY: JAMES GRAIN & ELEVATOR *Debtor*	NO. J-80-155 B

ORDER APPROVING INTERIM TRUSTEE APPLICATION FOR AUTHORITY TO ASSUME EXECUTORY CONTRACTS SETTING UP BANK DEPOSITORY ACCOUNTS AND PAYMENT OF FARMERS GRAIN PURCHASE CONTRACT

On this 27th day of August, 1980, comes on for hearing the application of Interim Trustee for authority to assume executory contracts and from the above styled petition and from statements of Interim Trustee, Robert P. Lindsey; from statements from the attorneys for interim trustee; attorneys from 1st Tennessee Bank, N.A., Memphis, Tennessee; attorneys for the Corning Bank, Corning, Arkansas; and from the entire record of these Chapter 7 proceedings and after proper notice of this hearing by the

Court and other matters and things before the Court, the Court finds:

1. That on or about August 12, 1980, this Court by written order appointed applicant as Interim Trustee for the Debtor. That applicant has qualified by posting the required bond.

2. That on or about August 15, 1980, this Court entered an order authorizing Interim Trustee to operate the business of the Debtor under the terms thereof and for the reasons therein stated.

3. That upon assuming his duties as Interim Trustee, applicant has determined that there are various outstanding contracts with farmers and other entities in both Arkansas and Missouri for the purchase by Debtor from said farmers of substantial quantities of milo and/or sorghum. That said contracts of purchase from farmers by the Debtor provide for delivery by farmers to the Debtor at various locations of Debtor during various times during the fall and early winter of 1980. That some of the contracts with farmers provide for delivery at "harvest" and others during certain specified months. That the price for the purchase of the milo by Debtor from farmers has been agreed upon in said contracts. That Debtor in the aggregate has contracted with farmers for the purchase of milo in the approximate amount of 74,000,000 pounds for delivery in the fall and early winter of 1980. That said purchase contracts require delivery by farmers and other entities at specified times and require payment by Debtor to farmers at said times for said milo.

4. That Debtor prior to the filing of the voluntary Chapter 7 petition entered into contracts of purchase and sale with Farmers Export Co., Kansas City, Missouri; Producers Grain Corporation, Amarillo, Texas; and Continental Grain Company of Kansas City, Missouri, for the

purchase by said companies from Debtor of substantial quantities of milo in the approximate amount of 100,000,000 total pounds. That said purchase and sale contracts were both priced and unpriced with respect to the consideration to be paid to Debtor by said companies upon delivery.

5. That Debtor in the aggregate has contracted for sale approximately 39,000,000 pounds of milo on a priced basis with Farmers Export Company. That Debtor has contracted for sale approximately 32,000,000 pounds of milo on a priced basis with Producers Grain Corporation. That in addition, Debtor has contracted for sale on an unpriced basis approximately 25,000,000 pounds of milo with Farmers Export Company. That further, Debtor has contracted for sale approximately 4,000,000 pounds of milo on a priced basis with Continental Grain Company.

6. That Debtor does not presently and may not for the foreseeable future have sufficient cash funds to complete said contracts of purchase with farmers and other entities. However, substantial profits can be realized by Debtor for the benefit of Debtor's estate and for all creditors and other interested parties if Debtor is able to negotiate an acceptable arrangement and modification of the contracts with the above companies so that cash funds may be on hand with which to pay farmers for the delivery of their milo during the fall and early winter of 1980. That it is in the best interest of the Debtor, its estate, the creditors, and other interested parties that Debtor be able to perform the above mentioned executory contracts, as modified, so that substantial revenues may be generated for the estate. That a substantial built-in profit margin is in existence for Debtor under the terms of the above contracts should it be able to perform the same.

7. That by mutual agreement, Interim Trustee for the Debtor, Farmers Export Company and Producers Grain

Corporation have determined that the various executory contracts, as modified, should be performed as follows:

A. The Interim Trustee shall assume for the benefit of the Debtors' estate all contracts for the purchase of milo entered into by the Debtor.

B. The farmers shall be paid for delivery of milo under contract with Debtor by Interim Trustee upon said grain being delivered by farmers to selected locations of Debtor not to exceed three (3) locations, with actual payments and settlements for grain delivery to be made by Interim Trustee with farmers only at Debtor's facility at Corning, Arkansas.

C. The Interim Trustee will use his best efforts to see that all contracts of the Debtor with the farmers are filled and will take such action, legal and otherwise, as is reasonably necessary, in order to enforce performance of such contracts.

D. That upon the grain being delivered to the three locations and upon farmers being paid by Interim Trustee for said delivery of milo, title to said milo shall be considered to have passed to said grain companies free and clear of any liens of any party, said title not to be affected thereafter by any adversary proceedings, cause of action or otherwise that might be filed later in these Chapter 7 cases for Debtor.

E. That Interim Trustee and the above grain companies have agreed further that deliveries of grain shall be made by Interim Trustee to said grain companies as close as possible to actual delivery dates in the various contracts for sale of the milo. Interim Trustee shall use his best efforts to meet and comply to the extent possible with said delivery dates but shall

not be penalized economically or otherwise should said delivery dates not be specifically met.

F. Interim Trustee and the above three grain companies have further agreed that delivery of the milo shall be made by Interim Trustee to said grain companies on a pro rata basis with deliveries to be prorated among the grain companies from time to time on an equitable basis in accordance with the terms of this Application. That during the course of the performance of these executory contracts as modified by Interim Trustee, the proration of the grain shall be administered by Interim Trustee and his employees in a consistent, equitable, and fair manner to carry out the intent and purpose of this Application.

G. That Interim Trustee and the above grain companies have further agreed that Interim Trustee shall use his best efforts to cause farmers to deliver the milo under contract with Debtor to the three (3) locations. That upon Interim Trustee employing his best efforts in accordance with Paragraph 7C of this Application, absolutely no claims or otherwise in any amount shall be filed by the three grain companies against Interim Trustee or the Debtor for failure to deliver the contracted quantities of milo set forth and appearing in each executory contract between Debtor and the three grain companies. The following discounts shall apply to all milo delivered to the grain companies by Interim Trustee: Test Weight—Five (5) Cents shall be deducted from the price per hundred weight for each pound below fifty-five (55) pounds. Moisture—Contract price shall be reduced by Two (2) percent for each one half (½) percent of moisture over Fourteen (14) percent. Total Damage—Five (5) cents shall be deducted from the price per hundred weight for each

one (1) percent of total damage over Five (5) percent. Foreign Material—Three (3) cents shall be deducted from the hundred weight price for each One (1) percent of foreign material over Eight (8) percent. Musty—Fifteen (15) cents shall be deducted from the hundred weight price. Sour—Twenty (20) cents shall be deducted from the hundred weight price. Weevily—Twenty (20) cents shall be deducted from the hundred weight price.

H. Interim Trustee and the above grain companies have further agreed that all contracts, priced and unpriced, between Debtor and the three grain companies shall be filled on a pro rated basis so that each grain company shall be entitled to receive a percentage of the total milo received by the Interim Trustee in the same ration that each such company's total contracted milo bears to the total 100,000,000 pounds contracted for by Debtor, so that Farmers Export Company shall receive approximately 64% of all milo received, Producers Grain Corporation shall receive approximately 32%, and Continental Grain Company shall receive approximately 4%. Adjustments shall be made, on a day to day basis to the extent possible, in deliveries made to each company in order to maintain such ratio. Payment to the Interim Trustee for satisfaction of each contract shall be made as follows:

i. Each Farmers Export Company contract, including priced and unpriced contracts, shall be filled in order that milo was to be delivered pursuant to the contracts so that those contracts calling for an earlier delivery date would be satisfied in full prior to satisfaction of any contract calling for a later delivery date. All unpriced contracts shall be priced at $5.34 per hundred weight f.o.b.

Corning by rail. All priced contracts shall be at the price shown on the original contract less 26.8¢ per hundred weight and delivery shall be made f.o.b. Corning, Arkansas, rather than as specified in each of said contracts.

ii. Each of the Producers Grain Corporation and Continental Grain Company contracts shall be priced as provided in each contract, as hereinafter modified, with the contracts being satisfied in the order in which grain was to be delivered pursuant to said contracts, with the contracts providing for the earliest delivery dates being filled prior to the filling of any contracts calling for later delivery dates. The price for each contract shall be the price originally provided for in such contract plus 12.5¢ per hundred weight which shall be added to each such contract due to freight increases. Provided, however, that such 12.5¢ shall be the only additional charge to either Producers Grain Corporation or Continental Grain Company, and, specifically, there shall be no freight differential charge added to such contracts resulting from differences in freight costs based on the origination point of the milo. All Producers Grain Corporation contracts are priced f.o.b. Corpus Christi, Texas, and all Continental Grain Company contracts are priced f.o.b. Lake Charles, Louisiana.

I. It shall be the obligation of the Interim Trustee to maintain books, ledgers, and accounts of all transactions relating to the Debtors' contracts with the farmers and the Debtors' contracts with the three (3) grain companies which are assumed as modified and all such books and records shall be available to each of the three (3) grain companies for examination at any reasonable time.

J. Farmers Export Company, Producers Grain Corporation, and Continental Grain Company shall remit to the Bank of Corning for the account of Interim Trustee by wire transfer, letter of credit, or otherwise sufficient monies not to exceed in the aggregate $100,000 at any time to enable Interim Trustee to perform the above executory contracts with farmers. The initial contributions of such funds shall be made by the three (3) grain companies, with each company remitting its proportionate share of such funds based upon each company's entitlement to participate on a pro rata basis in having its contracts filled in the manner hereinabove provided. The amount on deposit with the Bank of Corning shall be adjusted on a day to day basis as payments are made to farmers with each grain company being obligated to remit to the Bank such amounts as are necessary to cover the cost of the amount of grain received by each such grain company on a particular day so that at the beginning of each business day the Trustee shall be entitled to maintain not to exceed $100,000 in the account with which to purchase grain during that business day. The Bank of Corning has agreed to act under such arrangement and has agreed to handle all bookkeeping and record keeping as may be appropriate and necessary to carefully document the above arrangement, and the grain companies should be entitled to the Bank's written agreement to abide by such agreement before being obligated to deposit funds pursuant to the Court's Order. That payments will be made to farmers by Interim Trustee by drafts drawn on his account at Bank of Corning or by checks drawn on his account at Bank of Corning.

K. That Bank of Corning has agreed with Interim Trustee not to set off or attempt to set off any funds

in Interim Trustee's account at Bank of Corning transferred to said account for his benefit by the above grain companies with respect to any previous obligation owed the Bank of Corning by Debtor or any company affiliated with Debtor.

L. All milo may be sold by Interim Trustee to the above grain companies free and clear of any liens held by he First Tennessee Bank, N.A., Memphis, and the Corning Bank of Corning, Arkansas. However, all sales are subject to valid crop liens, and the rights of all secured creditors to the proceeds in excess of the purchase price shall be subject to the orders of this Court and as to all rights and interest therein and said interest are not diminished hereby.

8. That Continental Grain Company has until Wednesday, September 3, 1980, to elect to participate in the arrangement as provided in paragraph 7 above set out. It said Continental Grain does not file its election to participate with Court no later than said date, the Interim Trustee rejects all executory contracts held by the Debtor with Continental Grain Company. In the event Continental Grain Company does not file such election, this Order shall nonetheless remain fully enforceable and effective as to the Interim Trustee, Farmers Export Company, and Producers Grain Corporation, and all grain received by the Debtor pursuant hereto shall be pro rated between Farmers Export Company and Producers Grain Corporation.

9. The Interim Trustee or his successor shall be paid by the above named grain companies at such time as the grain purchased by said companies reaches the first grade and weight stations as provided in the contracts of purchase as above modified.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, AND DECREED that Robert P. Lindsey,

Interim Trustee of the Debtor, be and hereby is authorized under §365 of the Bankruptcy Code to assume the executory contracts as modified and set herein above and for the recovery of his costs herein expended.

IT IS SO ORDERED.

/s/ Charles W. Baker
Charles W. Baker, Bankruptcy Judge
Date: August 29, 1980

APPROVED:

Original Signed By
A. Jan Thomas, Jr., Atty.
A. Jan Thomas, Jr.,
One of the Attorneys for the Interim Trustee

cc: Mr. Charles Casey, Chief, Special Procedures,
Internal Revenue Service
Arkansas Department of Finance and Administration
Arkansas Employment Security Division
Arkansas State Plant Board
Missouri Department of Agriculture; Debtor
Allen Bird, Esq.
Kirby Riffel, Esq.
Stanley Langley, Esq.
Everett Gibson, Esq.
Mr. John Reams, Far Export Company
William F. Kirsch, Jr., Esq.
Craig Donelson, Esq.
Michael F. Pleasants, Esq.
Warren Dupwe, Esq.
Joe Stange, Producers Grain Corporation
Warren E. Zimmerman, Esq.
Cecil Emerson, Esq.
First Tennessee Bank, N.A. Memphis, Tennessee
The Corning Bank
Arkansas Attorney General
Scott Manett

APPENDIX C

IN THE

UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE: DON JAMES, ROBERT JAMES and G. E. JAMES, a general partnership, d/b/a Frisbee Cotton Company; and James Grain & Elevator, a/k/a James Gin & Elevator Company, a general partnership, *Debtors.*	Case No. JO 80-00155

APPLICATION FOR DETERMINATION OF OWNERSHIP OF CUSTOMER-OWNED ASSETS, FOR LIQUIDATION OF CUSTOMER-OWNED ASSETS AND DISTRIBUTION OF THE PROCEEDS

COMES NOW John G. Runyan, Director of the Missouri Department of Agriculture, by and through his attorneys, John Ashcroft, Attorney General of Missouri, and Gerald M. Sill, Assistant Attorney General, and states:

1. John G. Runyan is the duly qualified, appointed and acting Director of the Missouri Department of Agriculture. The Missouri Department of Agriculture was created by Section 261.010, RSMo 1978. The Office of the Commission of Agriculture was created by Section 261.020, RSMo 1978, and the duties and powers of the Commissioner are transferred to the Director of the Department of Agriculture pursuant to Section 2 of the Missouri Omnibus State Reorganization Act of 1974.

2. The Director of the Missouri Department of Agriculture is responsible for the implementation, administration and enforcement of the "Missouri Grain Warehouse Law", Sections 411.010 to 411.765, RSMo 1978. Pursuant to the provisions of the Missouri Grain Warehouse Law, relator issues licenses allowing the operation of public grain warehouses in Missouri as defined by Section 411.026(20) and causes the examination and audit of the quantity, quality and grade of grain stored in said licensed grain warehouses.

3. Debtors' partnerships are licensed grain warehouse facilities, said facilities being located in Naylor, Ripley County, Missouri, license number P-UR-108; Caruthersville, Pemiscot County, Missouri, license number P-UR-430; New Madrid, New Madrid County, Missouri, license number P-UR-431; and Holcomb, Dunklin County, Missouri, license number P-UR-98.

4. On August 12, 1980, John G. Runyan, the Director of the Missouri Department of Agriculture, hereinafter applicant, in accordance with Section 411.519, RSMo 1978, sought from the appropriate circuit courts and obtained orders appointing him receivor of debtor's facilities described above in accordance with said section on the grounds that he had evidence that debtors were insolvent. Copies of the orders are attached as Exhibit A. Thereafter, this bankruptcy proceeding was initiated.

5. The order received by applicant as authorized by statute gave applicant authority to operate or liquidate the aforesaid grain warehouse facilities as may be deemed appropriate by said applicant.

6. In accordance with said order, applicant took control of the aforesaid Missouri public grain warehouses and commenced to conduct a complete investigation and audit

of all grain in the aforesaid facilities. A copy of said audit is attached hereto as applicant's Exhibit B.

7. As disclosed by applicant's Exhibit B, substantial amounts of grain are held by debtors, as bailees for hire, in trust for purposes of storage at the aforesaid public grain warehouse facilities.

8. Applicant suggests to the court that the interim trustee has a duty under Section 752(a) of the Bankruptcy Code to distribute the customer-owned grain or its equivalent in money, on store in debtor's facilities in accordance with appropriate proof displayed to the interim trustee subject to offset for any monies due and owing debtors relating to said grain.

9. That it is in the best interests of the individuals storing grain in debtors' facilities, and also in the best interests of debtors, that the grain be liquidated and/or equivalent monies be distributed as soon as possible in order to take advantage of optimum market conditions, and further, to prevent deterioration or loss of the grain and its value, that the interim trustee take immediate steps to liquidate the grain and distribute monies as appropriate.

10. Applicant suggests to the court that he has, in his employ, experts in the field of grain management and regulation and that he is well suited to act as the agent of the interim trustee or otherwise be of assistance in handling the sale and distribution of said assets and, further, that any participation by applicant will be done with the full assistance and cooperation of the Office of the Missouri Attorney General, and of the Office of the Missouri State Auditor.

WHEREFORE, applicant prays the court as follows:

1. For a determination that customer-owned grain held in trust by debtors (as bailees for hire) in accordance

with information contained in applicant's Exhibit B, be determined to be such and to be an asset held in trust by said debtors separate and apart from debtors' property.

2. That the interim trustee be ordered to seek proof of claims to the customer-owned grain at debtors' facilities; offset against said claims any monies due and owing debtors for storage or other charges related to said grain; liquidate grain as appropriate in debtors' facilities; and make distribution of the net claim due the grain storers either in full or pro rata as the interests of the storers may appear.

3. That the interim trustee be authorized to employ as his agent or to seek assistance from applicant in carrying out the liquidation and distribution of the customer-owned grain in debtors' facilities.

4. That the interim trustee be ordered to proceed with all due speed in respect to the requests contained in this application in order to best serve the interests of the individuals storing grain in debtors' facilities.

5. That any excess monies remaining after full distribution of customer-owned grain or its equivalent in monies be turned over to the bankruptcy estate for further administration.

6. For such other relief as may be deemed proper and necessary.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

/s/ Gerald M. Sill
Gerald M. Sill
Assistant Attorney General
MBE#20843
P. O. Box 899

Jefferson City, MO 65102
(314) 751-3321
Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, this 3 day of September, 1980, to: Attorneys of record for Trustee.

/s/ Gerald M. Sill

IN THE

CIRCUIT COURT OF RIPLEY COUNTY, MISSOURI

STATE OF MISSOURI, ex rel. JOHN G. RUNYAN, Director of the Missouri Department of Agriculture, *Relator,* v. DONALD R. JAMES, ROBERT W. JAMES and GEORGE JAMES, d/b/a JAMES GIN & ELEVATOR COMPANY, located at Naylor, Missouri, *Respondents.*	Case No.

ORDER APPOINTING RECEIVER

The petition of relator for the appointment of a receiver having been reviewed and duly considered under the circumstances, it is

ORDERED that John G. Runyan, Director of the Missouri Department of Agriculture, be appointed as receiver in accordance with Section 411.519.6, RSMo 1978, of respondents' public grain warehouse located in Naylor, Ripley County, Missouri, and under License No. P-UR-108 issued by the Missouri Department of Agriculture; and it is

FURTHER ORDERED that the receiver make an audit and full investigation of the financial circumstances of respondents and carry out such operation or liquidation of said public grain warehouse in order to protect the best interests of those individuals storing grain in said facility.

/s/ Rex H. Henson
Judge, Circuit Court of Ripley County

Dated: 8/12/80

EXHIBIT "A"

IN THE

CIRCUIT COURT OE PEMISCOT COUNTY, MISSOURI

STATE OF MISSOURI, ex rel. JOHN G. RUNYAN, Director of the Missouri Department of Agriculture,
Relator,
v.
DONALD R. JAMES, ROBERT W. JAMES and GEORGE JAMES, d/b/a FRISBEE COTTON COMPANY, located at Caruthersville, Missouri,
Respondents.

Case No.

ORDER APPOINTING RECEIVER

The petition of relator for the appointment of a receiver having been reviewed and duly considered under the circumstances, it is

ORDERED that John G. Runyan, Director of the Missouri Department of Agriculture, be appointed as receiver in accordance with Section 411.519.6, RSMo 1978, of respondents' public grain warehouse located in Caruthersville, Pemiscot County, Missouri, and under License No. P-UR-430 issued by the Missouri Department of Agriculture; and it is

FURTHER ORDERED that the receiver make an audit and full investigation of the financial circumstances of respondents and carry out such operation or liquidation of said public grain warehouse in order to protect the best interests of those individuals storing grain in said facility.

/s/ William L. Ragland
Judge, Circuit Court of Pemiscot County

Dated: 8-12-80

IN THE

CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI

STATE OF MISSOURI, ex rel. JOHN G. RUNYAN, Director of the Missouri Department of Agriculture, *Relator,* v. DONALD R. JAMES, ROBERT W. JAMES and GEORGE JAMES, d/b/a FRISBEE COTTON COMPANY, located at New Madrid (Ristine), Missouri, *Respondents.*	Case No.

ORDER APPOINTING RECEIVER

The petition of relator for the appointment of a receiver having been reviewed and duly considered under the circumstances, it is

ORDERED that John G. Runyan, Director of the Missouri Department of Agriculture, be appointed as receiver in accordance with Section 411.519.6, RSMo 1978, of respondents' public grain warehouse located in New Madrid, New Madrid County, Missouri, and under License No. P-UR-431 issued by the Missouri Department of Agriculture; and it is

FURTHER ORDERED that the receiver make an audit and full investigation of the financial circumstances of respondents and carry out such operation or liquidation of said public grain warehouse in order to protect the best interests of those individuals storing grain in said facility.

_____

Judge, Circuit Court of New Madrid County

Dated: _____

IN THE

CIRCUIT COURT OF DUNKLIN COUNTY, MISSOURI

STATE OF MISSOURI, ex rel. JOHN G. RUNYAN, Director of the Missouri Department of Agriculture,
Relator,

v.

DONALD R. JAMES, ROBERT W. JAMES and GEORGE JAMES, d/b/a FRISBEE COTTON COMPANY, located at Holcomb, Missouri,
Respondents.

Case No.

ORDER APPOINTING RECEIVER

The petition of relator for the appointment of a receiver having been reviewed and duly considered under the circumstances, it is

ORDERED that John G. Runyan, Director of the Missouri Department of Agriculture, be appointed as receiver in accordance with Section 411.519.6, RSMo 1978, of respondents' public grain warehouse located at Rt. #1, Marley, Dunklin County, Missouri, and under License No. P-UR-98 issued by the Missouri Department of Agriculture to serve under his official bond; and it is

FURTHER ORDERED that the receiver make an audit and full investigation of the financial circumstances of respondents and carry out such operation or liquidation of said public grain warehouse in order to protect the best interests of those individuals storing grain in said facility.

/s/ Charles H. Baker
Associate Judge, Circuit Court of Dunklin County

Dated: 8/12/80

APPENDIX D

IN THE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE: DON JAMES and wife, BETTY JAMES, Individually, and d/b/a JAMES OIL COMPANY, GINNERS OIL MILL PROPERTY *Debtor*	No. J-80-153-B
IN RE: COX COTTON COMPANY d/b/a JAMES GRAIN & COTTON CO. *Debtor*	No. J-80-154-B
IN RE: DON JAMES, ROBERT JAMES and G. E. JAMES, a general partnership, d/b/a FRISBEE COTTON COMPANY: JAMES GRAIN & ELEVATOR *Debtor*	No. J-80-155-B

ORDER GRANTING TRUSTEE'S APPLICATION FOR ASSISTANCE OF UNITED STATES MARSHALS IN PRESERVING ASSETS OF DEBTORS

On September 11, 1980, at the U.S. Post Office and Courthouse Building, Jonesboro, Arkansas, on this Court's own motion, came on for consideration the above styled Application of the Trustee filed September 10, 1980; and from statements made in open Court by one of the duly appointed attorneys for the Trustee, Ben F. Arnold; and

from the entire record of these proceedings and the Court being aware from the Statements of Affairs that substantial assets exist in each debtor entity that are in need of preservation and protection from loss, destruction and damage; and from other things and matters considered and no party or attorney appearing in opposition to the relief requested by Trustee in the Application; the Court finds:

1. That Robert P. Lindsey is the duly appointed, qualified, and acting Trustee for each of the above captioned debtor entities and has already qualified by posting the required bond. That on September 11, 1980, by Order of this Court, Mr. Lindsey was appointed the permanent Trustee for each debtor entity. That in fact Mr. Lindsey has been the permanent Trustee since August 27, 1980, when the creditors of the debtor entities at the first meeting of creditors failed to elect a Trustee.

2. That on August 15, 1980, this Court entered an Order in each of the above Chapter 7 captioned proceedings authorizing Mr. Lindsey as Interim Trustee to operate the business of the debtors. That said Order has not been appealed from and is now final.

3. That this Court has carefully examined its jurisdiction and powers under the United States Bankruptcy Code and under other statutory provisions of federal law. Under 11 U.S.C. §105, this Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. Under 28 U.S.C. §1481, a Bankruptcy Court shall have the power of a Court of equity, law, and admiralty... Under 28 U.S.C. §1471(c), the Bankruptcy Court for the District in which a case under Title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the District Courts. Under 28 U.S.C. §1471(e), the Bankruptcy Court in which a case under Title 11 is commenced shall have the exclusive jurisdiction of all

of the property, wherever located, of the Debtor, as of the commencement of such case. Further, under 28 U.S.C. §569(a), the U.S. Marshal is formally designated the marshal of the Bankruptcy Court. This Court concludes that if an Order is issued in aid of the Bankruptcy Court's jurisdiction by this Court, the marshal may execute the same pursuant to 28 U.S.C. §569(b). The Court finds and concludes that under the circumstances of these complex Chapter 7 proceedings, the most appropriate manner to protect the property and assets in the Trustee's custody and control would be through posted guards, appointed by the Marshal, and paid from the proceeds of the estate. Moreover, it is clear that the U.S. Marshal may take all necessary action as he deems necessary to preserve the peace pursuant to 28 U.S.C. §570. This Court further concludes that it has the power and jurisdiction to order the U.S. Marshal to arrest any person disturbing the property as a contempt of this Court's powers and jurisdiction. It is also clear that the U.S. Marshal may arrest any person interfering with the performance of the Marshal's duties including the protection of property under 18 U.S.C. §11.

4. The Court has been advised by the Trustee and his duly appointed counsel that presently there exists an unlawful seizure and possession of certain facilities owned by one of the above captioned debtor entities at Ristine, Missouri, in derogation of the lawful, exclusive rights of possession and control of the Trustee herein. The Court finds that the intent and purpose of the seizure of possession and/or blockade of said facilities by certain farmer-producers, residents of the State of Missouri, is and was to prevent and thwart Trustee in his fulfillment of certain milo contracts with certain farmers in Arkansas and Missouri and with three (3) grain purchasers. This Court has already entered an Order on August 29, 1980, which is now final and non-appealable, authorizing Trustee to assume

certain executory contracts as modified with three (3) grain producers. These contracts can only be fulfilled provided farmers deliver milo to the Trustee at the Ristine, Missouri facility and three (3) other facilities of the above debtors in Arkansas and Missouri. That the blockade and/or unlawful seizure of possession and control of the above facility of the Trustee in Ristine, Missouri, and any other or further unlawful activity at any other facilities of the Trustee at other locations is and will be considered by this Court to be in contempt of the power and jurisdiction of this Court which cannot be tolerated by this Court or by the Trustee, Robert P. Lindsey. That said unlawful possession, trespass and/or other activity including a blockade of the debtor's facilities interferes with the performance by Trustee of the above contracts and other duties with which he is charged under previous orders of this Court and the United States Bankruptcy Code.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the United States Marshal for the Eastern District of Arkansas; the United States Marshal for the Eastern District of Missouri; and the United States Marshal for any other district in which property of the Trustee on behalf of the above captioned debtor entities may be located, be and they hereby are ORDERED and DIRECTED to remove and take physical custody and possession of any equipment, personal property, or persons found to be blockading, obstructing, or in any way interfering with the facilities of the debtor entities without the expressed written permission of Trustee, Robert P. Lindsey; that the U.S. Marshals for the above districts be and they further are hereby ORDERED and DIRECTED to assist Trustee in his request to remove any person or property found to be blocking access or entrances to any of the debtor's premises wherever located; and the United States Marshals for each of the above districts be

and they hereby are ORDERED and DIRECTED further to arrest and bring before this Court any person found to be blockading, barricading, or in any other manner interfering with Trustee's capacity to operate the debtor's business in each of the above captioned proceedings; and, any such person or persons shall be brought by the United States Marshals for the above districts before this Court at Little Rock, Arkansas, to show cause, if any they have, why they should not be held in contempt of this Court under the contempt powers of this Court vested by the laws of the United States.

This Court will deliver a copy of this Order forthwith to the United States Marshals in the States of Arkansas and Missouri for implementation, action, and execution as provided by the laws of the United States including but not limited to the United States Bankruptcy Code.

ENTERED at Little Rock, Arkansas, this 15th day of September, 1980, but nunc pro tunc and effective as of September 11, 1980.

/s/ Charles W. Baker
Charles W. Baker, Bankruptcy Judge

cc: Robert P. Lindsey, Trustee
Ben F. Arnold, Esq.
A. Jan Thomas, Jr., Esq.
Warren Dupwe, Esq.
Mr. Louis French
Charles Gray, U.S. Marshal
All Attorneys of Record
All Debtors
Continental Grain Company
Farmers Export Company
Producers Grain Company

APPENDIX E

IN THE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE:
DON JAMES, ROBERT JAMES and G. E. JAMES, a general partnership, d/b/a FRISBEE COTTON COMPANY: JAMES GRAIN & ELEVATOR,

Debtor

No. J-80-155-B

TRUSTEE'S MOTION TO DISMISS APPLICATION FOR DETERMINATION OF OWNERSHIP OF CUSTOMER-OWNED ASSETS, THE LIQUIDATION OF CUSTOMER-OWNED ASSETS AND DISTRIBUTION OF THE PROCEEDS

Comes the Chapter 7 Trustee for the above debtor entity, Robert P. Lindsey ("Trustee"), by and through one of his duly appointed attorneys, Ben F. Arnold, and pursuant to Rule 12 of the Federal Rules of Civil Procedure made applicable herein by Bankruptcy Rule 712 and in support of his Motion to Dismiss states:

1. That applicant, John G. Runyan, Director of the Missouri Department of Agriculture, has failed to allege and state facts sufficient to give him legal standing to file this Application. That nowhere in the Application is it alleged that Mr. Runyan in his capacity as Director of the Missouri Department of Agriculture is a creditor of the

above debtor entity or has any authority whatsoever to act on behalf of creditors of the above debtor entity. That upon information and belief applicant holds no assignment of creditor claims in this proceeding. None are on file with the Bankruptcy Court. That in all respects applicant has no standing to file this Application.

2. That the Application is not in proper form as prescribed by the United States Bankruptcy Code, the Interim Rules of Bankruptcy Procedure, and the Rules of Bankruptcy Procedure in that the relief basically sought in the Application is in the nature of an adversary proceeding which is governed in all respects by Interim Bankruptcy Rules 7001 and following and by Rules of Bankruptcy Procedure 701 and following. In turn, adversary proceedings are governed by applicable Federal Rules of Civil Procedure with which this Application does not comply either in whole or in part. Trustee knows that several hundred individual farmers must be made parties defendant to any adversary proceeding or action to determine ownership of certain grain and/or sell the same free and clear of liens. The Application fails to make any parties defendants and fails to prescribe to whom notice of the Application should be sent. In addition, Trustee believes that First Tennessee Bank, N.A., of Memphis; White River Production Credit Association; Commodity Credit Corporation; The Corning Bank; The Cotton Exchange Bank, Kennett, Missouri, and perhaps other entities as well, are or may be claiming some lien, security interest, right, title, interest, equity or estate in and to the grain which is the subject of the Application. These conflicting claimants, of course, must be made parties defendants in any adversary proceeding relative to disposition of the grain or its proceeds.

3. The Application does not satisfy the requirements of Section 363(f) of the Bankruptcy Code.

WHEREFORE, the premises considered, Trustee pursuant to Rule 12 of the Federal Rules of Civil Procedure made applicable to the Bankruptcy Code and Adversary Proceedings by Rule 712 of the Rules of Bankruptcy Procedure prays that the Application filed by John G. Runyan, Director of the Missouri Department of Agriculture, be dismissed; for the recovery of his costs expended herein; and for all other proper relief to which he may be entitled.

ROBERT P. LINDSEY, *Trustee*

By His Attorneys:
WARREN DUPWE, ESQ.
P. O. Box 549
Jonesboro, Arkansas 72401
A. JAN THOMAS, JR., ESQ.
P. O. Box 1957
West Memphis, Arkansas 72301
and
DAVIDSON, PLASTIRAS, HORNE,
HOLLINGSWORTH & ARNOLD, LTD.
211 National Investors Building
Second at Broadway
P. O. Box 3363
Little Rock, Arkansas 72203

By: /s/ Ben F. Arnold
Ben F. Arnold

CERTIFICATE OF SERVICE

I, Ben F. Arnold, one of the attorneys for Robert P. Lindsey, Trustee, do hereby certify that a copy of the foregoing pleading has been served upon all attorneys of record herein by mailing a copy of same to them at their office addresses with sufficient prepaid postage this 15th day of September, 1980.

/s/ Ben F. Arnold
Ben F. Arnold

APPENDIX F

IN THE

CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI

STATE OF MISSOURI ex rel JOHN G. RUNYAN, DIRECTOR OF THE MISSOURI DEPARTMENT OF AGRICULTURE; STATE OF MISSOURI ex rel MISSOURI DEPARTMENT OF AGRICULTURE; JOHN G. RUNYAN, as Receiver of grain warehouses formerly operated by Donald R. James, Robert W. James and George E. James, Jr. located at New Madrid (Ristine), Caruthersville and Holcomb, Missouri under the business name FRISBEE COTTON COMPANY, and at Naylor, Missouri under the business name JAMES GIN & ELEVATOR COMPANY, a/k/a JAMES GRAIN & ELEVATOR COMPANY, and as Receiver of a grain warehouse operated by JAMES AGRI-CENTER, INC. as Debtor and Debtor In Possession at Neelyville, Missouri; and STATE OF MISSOURI ex rel JOHN ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI,

Plaintiffs,

v.

ROBERT P. LINDSEY, Trustee in Bankruptcy in Bankruptcy Case No. J-80-155-B in the Eastern District of Arkansas of Donald R. James, Robert W. James and George E. James Jr., partners of a General Partnership, d/b/a FRISBEE COTTON COMPANY, formerly doing business in New Madrid, Caruthersville and Holcomb, Missouri, and as Trustee in Bankruptcy in Bankruptcy Case No. J-80-155-B in the Eastern District of Arkansas of Donald R. James, Robert W. James and George E. James, Jr., partners of a General Partnership, d/b/a JAMES GIN & ELEVATOR COMPANY, a/k/a JAMES GRAIN & ELEVATOR COMPANY, formerly doing business in Naylor, Missouri; DONALD R. JAMES, ROBERT W. JAMES and GEORGE E. JAMES, JR., Co-Partners as Debtors with respect to businesses formerly conducted by them at New Madrid, Caruthersville and Holcomb, Missouri under the name Frisbee Cotton Company and formerly conducted by them at Naylor, Missouri under the name of James Gin & Elevator Company, a/k/a James Grain & Elevator Company; and JAMES AGI-CENTER, INC. as Debtor and Debtor In Possession in Bankruptcy Case No. J-80-155-B in the Eastern District of Arkansas,

Defendants.

Case No. CV180-355CC

ORDER TO SHOW CAUSE, TEMPORARY RESTRAINING ORDER AND SEIZURE ORDER WITHOUT NOTICE

This Court, having considered the Petition for Imme-

diate Possession and for Injunction filed herein on this date, and the Affidavit of John G. Runyan, Director of the Missouri Department of Agriculture, sworn to October 20, 1980; and it appearing that plaintiff Runyan was previously appointed by orders of this Court and the Circuit Courts of Dunklin County, Pemiscot County, Ripley County and Butler County, Missouri all dated August 12, 1980 (the "Receiver Orders"), pursuant to §411.519.6 of the Missouri Grain Warehouse Law, as the receiver (the "Statutory Warehouse Receiver") of the five grain warehouses previously operated by the respective defendants (other than Lindsey) at New Madrid (Ristine), Holcomb, Caruthersville, Naylor and Neelyville, each in the State of Missouri (the "Grain Warehouses"); and it further appearing that the Receiver Orders directed the Statutory Warehouse Receiver, after an audit and full investigation of the financial circumstances of the Grain Warehouses, to operate or liquidate the Grain Warehouses, as appropriate, in order to protect the best interests of those individuals storing grain in such public warehouses; and it further appearing that this Court has exclusive jurisdiction over the Statutory Warehouse Receiver and the grain in the Grain Warehouses; and it further appearing that this Court has exclusive subject matter jurisdiction of the subject of the plaintiffs' Petition herein and that the defendants are subject to the jurisdiction of this Court; and it further appearing that the police power and regulatory power of the State of Missouri are threatened and require that this Court exercise its exclusive jurisdiction over the Grain Warehouses and the grain contained therein so that such grain be rapidly distributed or liquidated as required by Missouri law; and it further appearing that the defendant Lindsey is purporting to act as a warehouseman in the State of Missouri without a license to do so, in violation of the Missouri Grain Warehouse Law, and is purporting

to act as a grain dealer in the State of Missouri without a license to do so, in violation of the Missouri Grain Dealers Law; and it further appearing that this is an action or proceeding by the plaintiffs as governmental units to enforce their police and regulatory power, the exercise of which has previously been prevented by the defendant Lindsey, as trustee, and by defendant James Agri-Center, Inc.; and it further appearing that immediate possession by the Director of Missouri Department of Agriculture and his authorized agents is necessary for the protection of depositors of grain held at the Grain Warehouses and for the protection of the holders of warehouse receipts previously issued by the Grain Warehouses; and it further appearing that irreparable injury will result unless this order is immediately granted; and it further appearing that no prior notice of the plaintiffs' Petition or of their motion upon which this order is granted is required to be given; and it further appearing that the order requested herein is necessary in aid of this Court's jurisdiction and Receiver Orders, to prevent the Receiver Orders from being rendered ineffectual and to enforce the police and regulatory powers, and good and sufficient cause having been shown for the relief requested, the Court having heard the attorneys for the plaintiffs, John Ashcroft, Attorney General, Gerald M. Sill, Assistant Attorney General and James F. Gunn, as counsel to the Attorney General,

NOW, on motion of plaintiffs, it is

ORDERED, that, pursuant to Chapter 411, RSMo, as amended, the Director and his authorized agents are hereby directed to take possession of and seize, by physical means, if required, the five Grain Warehouses as described in the plaintiffs' Petition herein and the grain and records contained therein; and it is further

ORDERED, that the Director and his authorized

agents are hereby authorized and directed to take any and all steps necessary to protect and preserve the grain and records contained in the five Grain Warehouses; and it is further

ORDERED, that the plaintiffs' motion for a temporary restraining order is granted in all respects by this order; and it is further

ORDERED, that the defendants show cause before this Court at the courthouse in New Madrid County, Missouri on November 6, 1980 at 10:30 A.M., or as soon thereafter as counsel can be heard (the "Hearing Date"), WHY an order should not be made herein enjoining and restraining the defendants and each of them, including defendant Lindsey, and their representatives, partners, officers, agents, servants, employees, attorneys and all persons acting in concert or participating with them and anyone else having notice or knowledge of this order, pending the final hearing and determination of this proceeding, from

(a) seeking, orally or in writing, or utilizing, or attempting to enforce, any order of any court, whether or not presently issued, concerning, involving or affecting the subject matter of the present proceeding, including without limitation (1) any order purporting to excuse defendant Lindsey from answering and responding to the within Petition, (2) any order which would purport to stay or enjoin the further prosecution of this proceeding or the enforcement of any statute of the State of Missouri, or (3) any order purporting to require any of the plaintiffs to show cause why they should not be held in contempt of any court;

(b) commencing or further prosecuting any proceedings in any court other than this Court, whether or not now pending, involving any or all of the subject matter of this proceeding;

(c) taking any action or steps in defendant Lindsey's adversary proceeding pending in the bankruptcy court in Arkansas under Nos. J-80-154-B and J-80-155-B as against any of the several hundred individual defendants therein who are depositors of grain or holders of receipts issued by any of the five Missouri Grain Warehouses, and from noting any purported default by any of such defendants therein or from otherwise affecting their ownership of or rights in such grain in any manner;

(d) moving, transferring or removing any of the grain now contained in any of the five Missouri Grain Warehouses referred to in the Petition herein;

(e) interfering in any manner with the Statutory Warehouse Receiver, his agents or employees, in the exercise of their rights or the performance of their duties pursuant to this order, the Receiver Orders or the Missouri Grain Warehouse Law or the Missouri Grain Dealers Law; and

(f) from purporting to act or acting as a warehouseman or operating or purporting to operate a warehouse in the State of Missouri or from acting as a grain dealer in Missouri or from accepting shipments of or making delivery of any grain from any of the Grain Warehouses until such time, if any, as defendant Lindsey is issued a license as warehouseman or grain dealer, as the case may be, and cures any defaults by him pursuant to the law of the State of Missouri; and it is further

ORDERED, that pending the determination by this Court of the plaintiffs' Motion for Preliminary Injunction to be heard on the Hearing Date, the defendants and each of them, and their representatives, partners, officers, agents, servants, employees, attorneys and all persons acting in concert or participating with them and anyone else

having notice or knowledge of this order be and they hereby are, restrained and enjoined from:

(a) seeking, orally or in writing, or utilizing or attempting to enforce, any order of any court, whether or not presently issued, concering, involving or affecting the subject matter of the present proceeding, including without limitation (1) any order purporting to excuse defendant Lindsey from answering and responding to the within Petition, (2) any order which would purport to stay or enjoin the further prosecution of this proceeding or the enforcement of any statute of the State of Missouri, or (3) any order purporting to require any of the plaintiffs to show cause why they should not be held in contempt of any court;

(b) commencing or further prosecuting any proceedings in any court other than this Court involving any or all of the subject matter of this proceeding;

(c) taking any action or steps in defendant Lindsey's adversary proceeding pending in the bankruptcy court in Arkansas under Nos. J-80-144-B and J-80-155-B as against any of the several hundred individual defendants therein who were depositors of grain or holders of receipts issued by any of such five Missouri Grain Warehouses, and from noting any purported default by any of such defendants therein or from otherwise affecting their ownership of or rights in such grain in any manner;

(d) moving, transferring or removing any of the grain now contained in any of the five Missouri Grain Warehouses referred to in the Petition herein;

(e) interfering in any manner with the Statutory Warehouse Receiver, his agents or employees, in the exercise of their rights or the performance of their duties pursuant to this order, the Receiver Orders or the Missouri

Grain Warehouse Law or the Missouri Grain Dealers Law; and it is further

ORDERED, pursuant to the Missouri Grain Warehouse Law and the Missouri Grain Dealers Law, that pending the determination of the Motion for a Preliminary Injunction or the issuance to defendant Lindsey of a license as a warehouseman or grain dealer pursuant to the law of the State of Missouri, defendant Lindsey is enjoined and restrained from acting or purporting to act as a warehouseman or grain dealer in the State of Missouri and is enjoined and restrained from operating or purporting to operate any of the Grain Warehouses and from accepting shipments of or making delivery of any grain from any of the Grain Warehouses; and it is further

ORDERED, this order shall not be stayed or set aside unless and until such time as this Court, after hearing, determines that possession should be restored to the warehouseman; and it is further

ORDERED, that any response, including any memorandum of law, pleadings, motions and affidavits, by or on behalf of any of the defendants to the Motion of the plaintiffs for a Preliminary Injunction shall be served personally on Missouri Assistant Attorney General, Gerald M. Sill, at 8th Floor, Broadway State Office Building, Jefferson City, Missouri, not later than ten (10) days prior to the Hearing Date; and it is further

ORDERED, that personal service of a copy of this order and the papers upon which it has been granted upon the defendant Lindsey by delivering copies thereof to his office located at 5206 Sherwood Road, Little Rock, Arkansas, or by delivering copies thereof to his attorney, Ben F. Arnold, 211 National Investors Life Building, Little Rock, Arkansas, on or before 6 P.M. on October 22, 1980, be, and

the same hereby is, good and sufficient service hereof and thereof; and it is further

ORDERED, that service of a copy of this order and the papers upon which it has been granted upon each of the defendants (other than defendant Lindsey), by mailing copies thereof by United States prepaid first class mail, addressed to them at their last known addresses, on or before October 22, 1980, be, and the same hereby is, good and sufficient service hereof and thereof; and it is further

ORDERED, that the Director of the Department be, and he hereby is, directed to send a copy of this order by mail to each known grain depositor at his last known address; and it is further

ORDERED, that the Director of the Department be, and he hereby is, directed to cause publication of a copy of this order on two separate occasions in a newspaper of general circulation in each of New Madrid, Pemiscot, Butler, Ripley and Dunklin Counties in Missouri.

/s/ William L. Ragland
Hon. William L. Ragland
Circuit Judge
Circuit Court
New Madrid County
Missouri

Dated: October 20, 1980

APPENDIX G

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE:
STATE OF MISSOURI; STATE OF MISSOURI EX REL JOHN G. RUNYAN, AS DIRECTOR OF THE MISSOURI DEPARTMENT OF AGRICULTURE; STATE OF MISSOURI EX REL MISSOURI DEPARTMENT OF AGRICULTURE; JOHN G. RUNYAN, AS RECEIVER OF CERTAIN GRAIN WAREHOUSES; AND STATE OF MISSOURI EX REL JOHN ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI,
Petitioners

No. J-C-80-244

ORDER

On November 18, 1980, J. Gary Hart, James C. Hart, Rudy Gazaway, Jr., Delono Edington, James Edington, David Graham, Bill Richardson, J. H. Bryant, Lavern Weinsenbach, Billy Baltz, Larry Kueter, J. H. Lamb, W. H. Pride, Jr., Coldman Luttrell, Jerry Little, Bobby Brooks, Willard Books, Jerry D. Cherry, David Ungerank, John Ungerank, Bob Wren, Martin Wren, Gene T. Cox, Tom Liebhaber, Bud Liebhaber, J. T. Kirk, Hubert Brodell, Raymond Mock, Bill Holifield, Jim Allison, Mrs. J. D. Layton, Mike Layton, Dorothy C. Wright, Williard D. Cox,

Ivan E. Alexander, Gary Gazaway, Jimmy Cole, Carlton Throesch, Ed Watson, Allen Johnson, Faye Duff, Shaver J. Dunn, Danny Johnson, Vicent Manning, Russell Johnson, Phyllis Burrow for Cherry Estates, Lonnie Little, Marshall Little, Rick Little, and Larry Waddell moved for leave to intervene in this proceeding.

Movants allege that their grain, which was stored in the debtors' warehouses in Arkansas, has been transferred to warehouses owned by debtors, in Missouri and involved here; that since there are competing claims to the grain stored in the Missouri warehouses, the matter should be resolved in the Bankruptcy Court where the debtor companies have filed their petition.

While the Court feels that because of the extraordinary nature of a Writ of Prohibition it might be better for movants to proceed as amici curiae, the Court is persuaded that since movants claim a direct interest in the grain in controversy and their attorney was allowed to participate in oral argument with the acquiescence of the parties, movants should be, and they are hereby, granted permission to intervene in this case, and the Clerk is directed to file the pleading accompanying movants' motion.

IT IS SO ORDERED this 25th day of November, 1980.

/s/ George Howard, Jr.
United States District Judge

APPENDIX H

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

IN RE:
STATE OF MISSOURI Ex Rel JOHN G. RUNYAN, Director of the Missouri Department of Agriculture; STATE OF MISSOURI Ex Rel MISSOURI DEPARTMENT OF AGRICULTURE; JOHN G. RUNYAN, as Receiver of certain grain warehouses; and STATE OF MISSOURI Ex Rel JOHN ASHCROFT, Attorney General of the State of Missouri,
Petitioners

No. J-C-80-244

ORDER PERMITTING INTERVENTION

ORDERED:

That Robert P. Lindsey, Trustee for Cox Cotton Company d/b/a James Grain & Cotton Co. (Chapter 11 debtor in Case No. J-80-154-B) and Chapter 11 reorganization Trustee for Don James, Robert James and G. E. James, a general partnership, d/b/a Frisbee Cotton Company; James Grain & Elevator a/k/a James Gin & Elevator (Chapter 11 debtor in Case No. J-80-155-B) be, and he is hereby, authorized to intervene in the above-captioned case as a party-respondent.

Dated this 17th day of November, 1980.

/s/ George Howard, Jr.
United States District Judge

APPENDIX I

IN THE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE: COX COTTON COMPANY d/b/a JAMES GRAIN & COTTON CO. *Debtor*	No. J-80-154-B
IN RE: DON JAMES, ROBERT JAMES and G. E. JAMES, a general partnership, d/b/a FRISBEE COTTON COMPANY; JAMES GRAIN & ELEVATOR *Debtor*	No. J-80-155-B

ROBERT P. LINDSEY, TRUSTEE ..... *Plaintiff*

v. Adv. Proc. No. 800414

FIRST TENNESSEE BANK, N.A. — MEMPHIS, a national banking association, *et al.* ..... *Defendants,*

ORDER AUTHORIZING TRUSTEE TO SELL ALL GRAIN STORED IN DEBTORS' WAREHOUSES IN THE STATE OF ARKANSAS

On the 2nd day of February, 1981, at 10:00 a.m. came on for hearing and trial the Trustee's Complaint to Sell Grain Free and Clear of Liens ("Complaint") filed herein September 23, 1980, as amended on October 17, 1980, and on January 16, 1981; and from the Complaint; from various answers and responses filed by farmers who are residents

of Arkansas and Missouri; from the Answer of the United States; from the Answer of First Tennessee Bank, N.A.—Memphis; from the Answer of The Corning Bank; and from other answers and/or responses filed by other defendants to this adversary proceeding; from that certain Order and Notice of Hearing entered by this Court on January 12, 1981, setting this adversary proceeding for hearing for February 2, 1981; at 10:00 O'Clock a.m. at the U.S. Post Office and Courthouse Building, Little Rock, Arkansas, insofar as it relates to the sale of the Arkansas grain free and clear of liens; from statements of Ben F. Arnold, Warren Dupwe, and A. Jan Thomas, Jr., attorneys representing plaintiff, Robert P. Lindsey, Trustee; from statements of Robert Branch and Scott Manatt, attorneys representing The Corning Bank; from statements of Bill W. Bristow, attorney representing certain Arkansas and Missouri farmers claiming to own grain situated in debtors' warehouses in the State of Arkansas; from statements of Bob Ross, an attorney for the Arkansas State Plant Board; from statements of William F. Kirsch and Craig Donaldson, attorneys representing First Tennessee Bank, N.A.—Memphis; from statements of Donald McCartney and Claude Skelton, attorneys representing the Commodity Credit Corporation, Mr. McCartney being employed by the United States Department of Justice; from testimony taken ore tenus at the bar of this Court from Jim Lacy, Head, Grain Division, Arkansas State Plant Board; from Jim Hovis, an employee of the Trustee; from Louis French, administrative assistant to the Trustee; from Robert P. Lindsey, Trustee for the above captioned debtor entities; from Rudy Gazaway, one of the farmer-defendants represented by Bill W. Bristow; from the testimony of George W. Harrison, an employee of the United States Department of Agriculture; from the testimony of Eric Jones, an employee of the United States Department of Agri-

culture; from the testimony of Gary Coleman, an employee of the United States Department of Agriculture; and from the testimony of David Bell, Chief of Claims and Collections Division of the Agriculture Stabilization and Conservation Service; from all exhibits introduced into evidence through the above witnesses; from all pleadings in this adversary proceeding and from other things and matters considered and the Court being well and sufficiently advised as to all matters of law and fact herein, finds:

1. That it has jurisdiction of the subject matter of this adversary proceeding and over all parties in accordance with 28 U.S.C. §1471; 28 U.S.C. §1481; 11 U.S.C. §105; 11 U.S.C. §363, and other relevant provisions of the United States Bankruptcy Code, the Rules of Bankruptcy Procedure, and the Interim Bankruptcy Rules.

2. That all parties hereto have had due process notice of the hearing and trial in this adversary proceeding as it relates to whether the grain stored in debtors' warehouses in the State of Arkansas should be sold at this time by the Trustee, the method of sale if the sale should be approved, and other matters related to the sale, if authorized. That this Court entered on January 12, 1981, a certain Order and Notice of Hearing setting the above matter for hearing and trial on February 2, 1981, at 10:00 a.m. at the above place which Order and Notice of Hearing was mailed by the Clerk of this Court and/or the Trustee to all parties entitled to receive the same under the United States Bankruptcy Code, the Rules of Bankruptcy procedure, and the Interim Bankruptcy Rules.

3. That matters relative to the sale of all grain have been previously stayed on two separate occasions by orders of the Eighth Circuit Court of Appeals after proper notice was given of the hearing and trial. That by Order dated January 5, 1981, the United States Court of Appeals for

the Eighth Circuit released from a previous stay order matters relative to the sale of the Arkansas grain only.

4. The only parties to this adversary proceeding presenting testimony at the trial at the U.S. Post Office and Courthouse Building, Little Rock, Arkansas, on February 2, 1981, at 10:00 a.m., were the Trustee, Robert P. Lindsey; certain farmer-clients represented by Bill W. Bristow; and the Commodity Credit Corporation, an instrumentality of the United States. No other parties offered any testimony in support or in opposition to the relief requested by the Trustee.

5. No creditors or other interested parties appeared at said hearing who desired their appearance noted of record.

6. No party or attorney who appeared at said hearing voiced any objection or opposition to the sale by the Trustee of the grain stored in debtors' warehouses in the State of Arkansas and in fact all parties appearing at said hearing were in agreement that from the testimony presented that the grain should be sold by the Trustee free and clear of liens with all valid liens and ownership claims, if any, to attach to the sale proceeds, all as authorized by 11 U.S.C. §363(f). That all parties were in agreement that the grain was deteriorating, was in danger of spoiling and that the grain should in fact be sold.

7. The Court further finds that Trustee should be and he hereby is authorized to sell all grain stored in debtors' warehouses in the State of Arkansas as a sale under 11 U.S.C. §363(b) other than in the ordinary course business which was authorized after notice and hearing.

8. The Court further finds that the sale herein authorized is being done with the express consent of all parties hereto and without the opposition of any entity claiming an interest in the commodities.

9. The Court further finds that each entity who is a party to this adversary proceeding has consented to the proposed sale by the Trustee in accordance with 11 U.S.C. §363(f)(2) and that all interests of the entities are in a bona fide dispute in accordance with 11 U.S.C. §363(f)(4).

10. The Court further finds that Trustee in the course of the sale of the commodities in question shall maintain and establish separate books and accounts for the proceeds of the sale by location and by commodity. Trustee be and he hereby is specifically authorized to deduct from the gross sale proceeds and deposit to his regular operating account or accounts such sums as are the reasonable and necessary costs and expenses from and after February 2, 1981, of preserving and disposing of the commodities as authorized by 11 U.S.C. §506(c).

11. The Court does hereby appoint a committee composed of Mr. Rudy Gazaway (a farmer-defendant), a representative to be designated by First Tennessee Bank, N.A. —Memphis who is not an attorney, and a representative to be designated by the Commodity Credit Corporation who is not an attorney to advise with and consult with the Trustee, Robert P. Lindsey, concerning the method, manner, and timing of the sale of the various commodities now situated in debtors' warehouses in the State of Arkansas. The members of the committee shall serve without compensation and at no cost to the Trustee and/or the debtor entities.

12. The Court further finds that the request of the Commodity Credit Corporation, an instrumentality of the United States, that it have and be able to exercise veto power over any judgment or decision of the Trustee in respect to his method of sale of any of the commodities should be and hereby is overruled and denied. The Court believes and from past experiences has every confidence

that the Trustee will exercise prudent business judgment in all matters relative to the sale. One of the purposes in this Court appointing a Trustee is for that individual to make complicated and complex decisions regarding the business affairs of debtor entities undergoing Chapter 11 reorganization proceedings. This Court will not, therefore, set specific guidelines as to when the Trustee should sell the commodities in question and by what method.

13. The Court finds that the Trustee, Robert P. Lindsey, should be given broad powers and discretion in selling and marketing the commodities in question and that Trustee using his best judgment in a prudent manner should determine the method, manner, and timing of the sale of the commodities. In this regard, this Court expects Trustee to be guided in part by the terms, provisions, and conditions of *Ark. Stat. Ann.* §58-302 dealing with the "exercise of judgment and care required" by fiduciaries and trustees handling trust estates. The Court further finds that the Trustee shall also be guided by other general principles governing duties and responsibilities required of trustees in administering estates not only under the above provision of Arkansas law but also under the relevant provisions of the United States Bankruptcy Code and other equitable principles governing responsibilities of fiduciaries in disposing of property in similar situations.

14. The Court further finds that Trustee should invest and reinvest, using his best judgment and discretion, all of the net sale proceeds in one or more certificates of deposit or other interest bearing obligations all as authorized and pursuant to 11 U.S.C. §345 dealing with "money of estates". This Court will not designate nor prescribe the institution or institutions in which Trustee should invest and reinvest said funds and will not prescribe the mode or manner of such investment. Trustee shall select

the institution or institutions in which said funds should be invested but shall maintain careful books and records of such investments by commodity and by location.

15. Trustee is specifically authorized to employ additional clerical help and assistance as may be reasonably necessary to carry out the terms of this Order authorizing the sale of the grain stored in debtors' warehouses in the State of Arkansas and so that proper and carefully maintained records may be in existence for inspection by any interested party and/or their attorney upon reasonable notice being given.

16. The Court further finds the existing $1,000,000 bond of the Trustee to be adequate, but will, upon request being made at some later time by any interested party consider increasing the bond.

17. The Court further finds that the nature, validity, and extent of all ownership claims, lien claims, or other claims of whatever kind or nature in and to the net proceeds from the sale of the commodities herein authorized shall be fully heard and determined by this Court at some later time pursuant to the appropriate notice and opportunity for hearing consistent with the needs of the parties.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, AND DECREED that Trustee's Complaint to sell grain situated in debtors' warehouses in the State of Arkansas free and clear of liens with all valid liens and ownership claims, if any, to attach to the net sale proceeds be and the same hereby is approved, authorized, and granted; that all entities who are parties hereto have consented to the proposed sale by Trustee under 11 U.S.C. §363(f)(2) or the interests of all entities is in bona fide dispute under 11 U.S.C. §363(f)(4); that this sale is found to be a sale authorized under 11 U.S.C. §363(b) as one

other than in the ordinary course of business after notice and hearing; that in the course of the selling of the commodities, Trustee shall maintain separate books and accounts for the proceeds of the sale by commodity and by location; that Trustee may deduct from the gross sale proceeds and deposit to his regular operating account or accounts such sums as are the reasonable and necessary costs on and after February 2, 1981, of preserving and disposing of the commodities under 11 U.S.C. §506(c); that a committee shall be established composed of Mr. Rudy Gazaway, a representative of First Tennessee Bank, N.A.—Memphis who is not an attorney, and a representative of Commodity Credit Corporation who is not an attorney to advise with and consult with Trustee concerning the method, manner, and timing of the sale of the various agricultural commodities; that Trustee is to exercise his best prudent judgment and discretion as to the method, manner, and timing of the sale of the commodities in accordance with all relevant laws and statutes of the State of Arkansas dealing with the powers and duties of trustees and fiduciaries and in accordance with similar principles contained in the United States Bankruptcy Code, the Rules of Bankruptcy Procedure, and the Interim Bankruptcy Rules; that this Court will not set specific guidelines as to when, how, and in what manner Trustee should sell and market the commodities in question since that is the exclusive responsibility of a Chapter 11 Trustee under these circumstances; that, further, Trustee is ordered to invest and reinvest in one or more certificates of deposit or other interest bearing obligations in one or more financial institutions of his choice all of the net proceeds of the sale until such time as this Court after notice and hearing shall determine the nature, extent, and validity of ownership claims, lien claims, and other claims in and to the net sale proceeds; that the request of the Commodity Credit

Corporation that it have veto power over the method of sale chosen by the Trustee be and expressly hereby is denied; and this Court retains jurisdiction over other matters in this adversary proceeding and over all parties hereto to hold additional hearings and enter additional orders as may be necessary and appropriate to protect the best interests of all concerned.

IT IS SO ORDERED.

/s/ Charles W. Baker
Charles W. Baker, Bankruptcy Judge
Date: Feb. 4, 1981

cc: Robert P. Lindsey, Trustee
Ben F. Arnold, Esq.
Warren Dupwe, Esq.
A. Jan Thomas, Jr., Esq.
Mr. Louis French
Gerald Dudley, C.P.A.
Scott Manatt, Esq.
Bill Bristow, Esq.
Robert Branch, Esq.
Bob Ross, Esq.
William F. Kirsch, Esq.
Craig Donaldson, Esq.
Donald McCartney, Esq.
Claude Skelton, Esq.
All Attorneys of Record
All Debtors
All Creditors Committees
Mr. George Proctor, U.S. Attorney
Securities and Exchange Commission
Paul Williams, District Director, IRS
U.S. Treasury Department

APPENDIX J

IN THE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE: COX COTTON COMPANY, d/b/a JAMES GRAIN & COTTON COMPANY	J 80-154
IN RE: DON JAMES, ROBERT JAMES, and G. E. JAMES, A GENERAL PARTNERSHIP d/b/a FRISBEE COTTON COMPANY, JAMES GRAIN & ELEVATOR CO.	J 80-155
ROBERT P. LINDSEY, TRUSTEE, *Plaintiff*	AP 80-414

VS.

FIRST TENNESSEE BANK, N.A., *et. al., Defendants*

ORDER

Comes now the Court in the above captioned matter on its own motion and pursuant to motions previously filed herein by parties in interest and finds that the following matters should come on before the Court seriatim in the order below described at 9:30 a.m. C.D.T., Monday May 18, 1981 in the Bankruptcy Courtroom, Room 445, United States Courthouse and Post Office Building, 600 West Capitol, Little Rock, Arkansas 72201:

1) Trustee's motion to sell free and clear of all liens and

encumbrances all grain of the debtor entities stored in Missouri warehouse and grain elevators.

2) Trustee's motion for the determination of entitlement to and ownership of all interest proceeds of grain account escrow funds.

3) Resolution of the entitlement of any party to a jury trial determination of its equity interest in any property of the debtor entities.

4) Appointment by the Court of a master to make to it suggested findings of fact and conclusions of law with respect to competing ownership interests of all party claimants to grain stored in Arkansas and in Missouri warehouses and grain elevators of the debtor entities, and elsewhere.

5) Motion of the trustee to assess certain fees for the storage both before and after the entry of the orders of relief herein of certain grain allegedly owned by the Commodity Credit Corporation, an agency of the Department of Agriculture of the United States Government.

In addition, the Court finds that a pre-trial hearing on all issues to be tried, as above described, should be held at the aforesaid Bankruptcy Courtroom on Friday May 8, 1981 at 10:30 a.m. C.D.T. for the purpose of determining deadlines for the exchanging of briefs and lists of witnesses and exhibits; for narrowing the questions of fact to be determined; and for any other matter which may at that time come on before the Court.

SO ORDERED THIS 22nd DAY OF APRIL, 1981

/s/ Charles W. Baker
Charles W. Baker
Bankruptcy Judge

APPENDIX K

IN THE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE: COX COTTON COMPANY, d/b/a JAMES GRAIN & COTTON COMPANY *Debtor*	No. J-80-154-B
IN RE: DON JAMES, ROBERT JAMES, and G. E. JAMES, a general partnership, d/b/a FRISBEE COTTON COMPANY; JAMES GRAIN & ELEVATOR *Debtor*	No. J-80-155-B
ROBERT P. LINDSEY, TRUSTEE, *Plaintiff* v. FIRST TENNESSEE BANK, N.A.—MEMPHIS, a national banking association, *et. al.*, *Defendants*	ADV. PROC #800414

MEMORANDUM OPINION ON TRUSTEE'S MOTION TO SELL ALL GRAIN SITUATED IN DEBTOR'S WAREHOUSES IN THE STATE OF MISSOURI AND IN MISSOURI FARMERS ASSOCIATION, INC. ELEVATOR AT BERNIE, MISSOURI

On the 18th and 19th of May, 1981, at the U.S. Post Office and Courthouse Building, Little Rock, Arkansas,

came on for hearing and trial Trustee's Motion in the above captioned adversary proceeding for authority from this Court to sell free and clear of liens under 11 U.S.C. §363(f) all grain presently situated in Trustee's warehouses in the State of Missouri and approximately 31,000 bushels of soybeans presently stored in an elevator facility owned and maintained by Missouri Farmers Association, Inc., a defendant hereto, at Bernie, Missouri. Due process notice of the hearing was given all parties and their attorneys and other entities by order of this Court dated April 22, 1981, which was mailed to all of the above by the Clerk of this Court. A pre-trial conference was held on Friday, May 8, 1981, at the U.S. Post Office and Courthouse Building, Little Rock, Arkansas, beginning at 10:30 a.m. which was attended by many of the attorneys representing defendants herein. On Tuesday, April 21, 1981, an informal conference of attorneys was held with this Court on certain issues related to the sale of the Missouri grain by Trustee free and clear of liens. That conference was also attended by many of the attorneys representing parties herein. In addition, on May 8, 1981, this Court entered another Order giving all parties, their attorneys and other entities notice of the hearing on Monday, May 18, 1981, at the U.S. Post Office and Courthouse Building, Little Rock, Arkansas, at 9:30 a.m. on plaintiff's Motion to Sell all Grain situated in debtors' warehouses and elevators in the State of Missouri, including the grain at Bernie, Missouri, free and clear of liens. The Order required not later than 5:00 p.m. Central Daylight Time, Friday, May 15, 1981, the filing of an original and one copy of a memorandum brief if so desired by any party as to any legal issue in controversy herein; an original and twelve (12) copies of a list detailing the name, address, and a summary of the expected testimony of any witness to be called; numbered exhibits to be produced at the hearing; and an original and twelve (12) copies of a list

of all persons, if any there be, and their addresses, who have been subpoenaed, along with a delineation of the documents, if any, which that person has been commanded to bring with him, and a summary of what the party expects to establish by means of such witness and/or such documents. That particular order was mailed by the Clerk of this Court to all parties, their attorneys, and other entities on May 8, 1981.

The Court finds that Trustee's Complaint to Sell the Missouri Grain Situated in Debtor's Elevator Facilities Free and Clear of Liens was filed originally September 23, 1980, and has been amended for various reasons on four (4) different occasions, the most recent being May 6, 1981. From time to time, additional defendants have been added as parties defendants in order that whatever rights, claims, or other interests, whether legal or equitable, said additional parties defendants might have in and to the grain in question and/or the sale proceeds if the grain should be ordered sold might be determined herein. Many parties have answered or otherwise responded to Trustee's Complaint, as amended. Other parties have not yet answered; but, this Court has not yet entered any default judgments against any defendant or defendants in favor of Trustee and does not intend to do so for at least the foreseeable future.

The Court finds that this particular adversary proceeding has been stayed on two separate occasions by stay orders entered by the United States Court of Appeals for the Eighth Circuit. The first stay order was dated October 21, 1980, and the second stay order was entered December 22, 1980. The stay orders were entered at the insistence of the State of Missouri and certain officials and/or instrumentalities of that state including, but not limited to, the Department of Agriculture of the State of Missouri and the

Attorney General of the State of Missouri and one or more of the state appointed receivers for the James debtor warehouses situated in the State of Missouri. The Court finds further that matters relative to the merits of the appeal over this Court's jurisdiction over the grain situated in debtors' warehouses in the state of Missouri were held in abeyance pending settlement negotiations between the parties to litigation in the United States District Court for the Eastern District of Arkansas and in the Eighth Circuit Court of Appeals. However, during the month of February, 1981, the parties to the consolidated appeals in the Eighth Circuit Court of Appeals advised that Court that further settlement negotiations at that time would not be productive and that oral argument should be scheduled on the merits of the consolidated appeals as to whether this Court had jurisdiction over the Missouri grain in debtors' warehouses administered by Trustee. On March 11, 1981, oral argument on the issues was had by counsel for the parties before the United States Court of Appeals for the Eighth Circuit. On April 8, 1981, the Eighth Circuit Court of Appeals handed down its Opinion and Order finding that this Court did in fact have exclusive jurisdiction over the grain situated in debtors' warehouses in the State of Missouri and that this Court had full jurisdiction, power, and authority to determine the adverse claims, including ownership claims to said grain and the proper disposition of the grain.

This Court has carefully reviewed the Memorandum Opinion and Order entered by the United States Court of Appeals for the Eighth Circuit and is cognizant of the directives entered by that Court in affirming the Memorandum Opinion and Order of the United States District Court for the Eastern District of Arkansas dated December 2, 1980.

The Court further finds that in response to this Court's

Order dated May 8, 1981, there have been filed certain pre-trial briefs by various parties on the issues discussed at the pre-trial conference. This Court has carefully considered the pre-trial briefs filed by the Trustee, Robert P. Lindsey, the plaintiff in this adversary proceeding; the pre-trial brief filed by defendant, Wayne Cryts, individually and as representative of certain of the Cryts farming entities located in the State of Missouri; the pre-trial brief filed by Mr. Richard Ramsay, an attorney for other Missouri farmers situated in the Ristine, Missouri, area; and a pre-trial brief filed by Mr. Bill Bristow, who represents certain Arkansas farmers who are claiming an interest in certain grain allegedly transferred from various of the debtors' warehouses in the State of Arkansas to elevators maintained by the James debtor entities in the State of Missouri. The Court has also examined other pre-trial pleadings filed by the parties and their attorneys relative to a summary of the expected testimony of witnesses and proposed exhibits that might be introduced at the hearing.

The Court is also aware that on May 15, 1981, Trustee filed a Motion for Judgment on the Pleadings and/or Motion for Summary Judgment regarding the alleged entitlement of Trustee to judgment under Rules 12(c) and 56 of the Federal Rules of Civil Procedure on certain issues joined in this adversary proceeding under 11 U.S.C. §363(f)(4)(5). Trustee's counsel advised the Court at the beginning of the hearing on May 18, 1981, of the relief therein requested. The Court took the same under advisement pending receipt of testimony and evidence.

At the hearing, the Trustee, Robert P. Lindsey, appeared in person and by his duly appointed attorneys, Ben F. Arnold, Warren Dupwe, and A. Jan Thomas, Jr. Wayne Cryts, one of the defendants, and certain of the Cryts farming interests were represented by Mr. Baker Kurrus.

Richard Ramsay, an attorney practicing at Pine Bluff, Arkansas, appeared on behalf of certain Missouri farmers situated in the Ristine, Missouri, area except Wayne Cryts. Mr. Kurrus was assisted at the hearing by Mr. Richard Jones, a Missouri attorney at law. First Tennessee Bank, N.A.—Memphis was represented at the hearing by Mr. William F. Kirsch and Mr. Craig Donaldson, attorneys at law, who reside in Memphis, Tennessee. Certain Arkansas farmers claiming an interest in the Missouri grain and/or the sale proceeds should the grain be ordered sold by this Court were represented by Mr. Bill Bristow, attorney at law, Jonesboro, Arkansas. Mr. Bristow also appeared on behalf of certain farmers represented by Mr. John Burris, attorney at law, Pocahontas, Arkansas. The Corning Bank was represented by Mr. Robert Branch, attorney at law, Paragould, Arkansas, and by Mr. Scott Manatt, attorney at law, Corning, Arkansas. IGF Insurance Company, the bonding company for the James debtor entities having elevator facilities in the State of Missouri, was represented by Mr. O. H. Storey, III, of Little Rock. Mr. Fred Harrison of Little Rock represented David Lawrence and G. M. Lawrence Farming Corporation of Missouri. Commodity Credit Corporation, an instrumentality of the United States, was represented at the hearing by Mr. Donald McCartney, an attorney at law with the United States Department of Justice; by Mr. Arnold Grundeman, Washington, D. C., counsel for the Commodity Credit Corporation; and by Mr. Claude Skelton, local counsel for the United States Department of Agriculture at Little Rock. The debtor entities and certain of the individual James family members were represented by Mr. Warren Zimmerman, attorney at law, Dallas, Texas. No creditor and/or party without counsel desired to appear of record.

The Court has carefully read all pleadings filed in this adversary proceeding relative to pending issues as to the

ownership of the Missouri grain, adverse claims to the Missouri grain, and whether the Missouri grain should be sold by Trustee free and clear of liens under 11 U.S.C. §363(f) or whether Trustee should be ordered by this Court to return some or all of the grain to certain defendants hereto. Without objection of any party, all claims filed against the James debtor entities in cases administered by Trustee were incorporated into the record of this proceeding by reference. Testimony was taken from the following witnesses: Robert P. Lindsey, Trustee for Cox Cotton Company, an Arkansas corporation, d/b/a James Grain & Cotton Company; Don James, Robert James, and G. E. James d/b/a Frisbee Cotton Company and James Gin & Elevator Company, general partnerships; and Don James and wife Betty James, individually and d/b/a James Oil Company and Ginners Oil Mill Property. Testimony was also taken from Mr. Louis French, an assistant to the Trustee who oversees on a daily basis the Trustee's general operating office at Corning, Arkansas. Testimony on behalf of certain Arkansas farmers was taken from Jim Allison, one of the farmer parties represented by Bill W. Bristow. Testimony was also taken from Wayne Cryts, Gary Hannah, and Tommy D. Hopkins, witnesses appearing on behalf of Wayne Cryts and other farmers situated in the Ristine, Missouri, area. Testimony was also taken from Mr. David Bell, Chief of Claims and Collections Division of the Agriculture Stabilization and Conservation Service. Various exhibits were introduced through the testimony of the above witnesses and have been examined by this Court. The Court also heard arguments of counsel for some of the parties after the close of all testimony and after all parties had rested.

From all of the above, the Court makes the following findings of fact:

1. Chapter 7 bankruptcy petitions were filed on Au-

gust 11, 1980, by all of the debtor entities for which Robert P. Lindsey of Little Rock is acting as now Chapter 11 Trustee. On September 11, 1980, Robert P. Lindsey was appointed permanent Chapter 7 Trustee after being appointed Interim Chapter 7 Trustee under previous orders of this Court dated August 11 and August 12, 1980. On September 22, 1980, by order of this Court at the request of certain of the Chapter 7 debtors, Cox Cotton Company, an Arkansas corporation, and the two Missouri general partnerships (Frisbee Cotton Company and James Gin & Elevator) the same were converted from Chapter 7 to Chapter 11 under the appropriate provisions of the United States Bankruptcy Code. Contemporaneously with the conversion of said cases from Chapter 7 to Chapter 11, Robert P. Lindsey of Little Rock was appointed Chapter 11 Trustee for said debtor entities.

2. At all times herein mentioned, Robert P. Lindsey has acted as either Chapter 7 or Chapter 11 Trustee for all of the above James debtor entities and has qualified as such by having posted with this Court a joint $1 million bond in favor of the United States, the State of Arkansas, and the State of Missouri.

3. Prior to the date of the filing of the Chapter 7 petitions, the James debtor entities for which Mr. Lindsey is serving as Trustee bought, sold, and stored grain of various kinds in both Arkansas and Missouri. Offices of Cox Cotton Company were generally maintained at Corning, Piggott, Biggers, Reyno, Pocahontas, and West Memphis, Arkansas. Operations of Frisbee Cotton Company, a general partnership, were maintained at Holcomb, Missouri; Caruthersville, Missouri; and Ristine, Missouri. The operations of James Gin & Elevator, a general partnership, were maintained primarily at Naylor, Missouri.

4. The Missouri Department of Agriculture upon re-

ceiving information from the United States Department of Agriculture, began auditing the books, records, and warehouse facilities of the James debtor entities' Missouri operations as early as mid-July, 1980, and continued to monitor said operations including a surveillance program of said operations for several months thereafter. Audit reports were made by the Missouri Department of Agriculture in July, August, and September of 1980. Later audit reports were made by the Missouri Department of Agriculture and the United States Department of Agriculture (Commodity Credit Corporation) in December, 1980, February of 1981, and May of 1981. Some of these audit reports were introduced into evidence at the hearing. The amounts and measurements of grain and other facts contained in the audit reports varied to some extent due to differences in measurement, statistical error, and different quantities of grain on hand for one reason or another at different times. Some discrepancies in amounts of grain claimed by some of the farmers was also noted.

5. The entire record of this hearing supports the Trustee's contention that there are conflicting adverse claims to the Missouri grain and that such claims are in a good faith, bona fide dispute as among the various parties, including the Trustee. Certain Missouri farmers (primarily those located in the Ristine, Missouri, area) claim that soybeans allegedly in storage at Trustee's elevator facility at Ristine, Missouri, should be returned to them in kind since there are no bona fide adverse claims to the soybeans. They contend ownership of the soybeans should be vested in them as a matter of law. The Court rejects this contention. The undisputed evidence clearly shows an inventory of soybeans at the date of the petition at the Ristine elevator of Frisbee Cotton Company in an amount of approximately 100,000 bushels or thereabouts. The testimony of the Trustee and audit records of the

Missouri Department of Agriculture received into evidence indicate farmer claims against the soybeans of at least 96,989.92 bushels. However, testimony of the Trustee and the proof of claim of First Tennessee Bank, N.A.—Memphis filed against the Frisbee Cotton Company debtor entity indicates total negotiable warehouse receipts for soybeans at the Ristine location of 10,500 bushels. When these claims are added together, it is clear that an insufficient amount of soybeans is on hand to satisfy all conflicting adverse claims to the soybeans. Further, the Trustee is claiming to own outright some or all of the soybeans not only at Ristine, but in other elevators of the debtor entities in the State of Missouri. The Court finds these claims as to ownership to have a substantial basis in fact and are asserted in good faith and are bona fide. It is at once apparent that should this Court or some appellate court determine that the outstanding warehouse receipts of First Tennessee Bank, N.A.—Memphis are void and invalid under the laws of the State of Missouri, Trustee would have a legitimate claim to ownership of the overage of the soybeans at the Ristine elevator. This amount would be at least 3,000 bushels or thereabouts. No other party has any ownership claim to the overage of soybeans at Ristine. Trustee also claims to own some or all of the soybeans also claimed by farmers at Ristine. These claims of ownership are predicated on a previous sale pre-petition of the soybeans to the Ristine elevator owned by Frisbee Cotton Company with the price to be set or established at some later time at the option of the farmer. These claims are based on contentions of the Trustee that title to the soybeans passed to the debtor entity at the time of delivery across the scales, that the soybeans were in fact not stored and title did not remain in the individual producers. These claims of ownership by the Trustee to the soybeans claimed by the farmers raise serious legal issues under Missouri

law which can only be decided after a full hearing and trial. The Court finds that no negotiable warehouse receipts were ever issued at the Ristine facility at the time soybeans or other grain was delivered to the Ristine facility. This occurred only at some later time at considerable difficulty upon the request of an individual producer or other entity. Ordinarily, requests were made for the issuance of warehouse receipts for loan purposes or so that a landlord could substantiate his alleged claim to ownership of the grain. Warehouse receipts at Ristine with respect to soybeans cover approximately 68,467 bushels of the soybeans in inventory with a smaller amount (28,522 bushels) being represented by non-negotiable scale tickets. The Court finds that there are bona fide disputes among the parties as to the validity of each individual warehouse receipt and scale ticket at not only Ristine, but other elevators in Missouri operated pre-petition by the debtor entities and now by Trustee. There is also a question as to the present holders of at least some of the receipts. It appears that some of the warehouse receipts may have been surrendered to the debtor entities prior to the filing of the petition but that the individual producer was not paid. It also appears that certain of the warehouse receipts and/or scale tickets may have been surrendered pre-petition and the individual producer paid by an insufficient fund check drawn on Frisbee Cotton Company. At least two of these checks were issued at the Ristine elevator of Frisbee Cotton Company pre-petition. It also appears from the evidence that many of the Missouri farmers who are claiming to have soybeans stored at the Ristine elevator of the debtor entities and who allegedly own them under negotiable warehouse receipts have in fact pledged these negotiable warehouse receipts to Commodity Credit Corporation for a pre-petition loans. From the evidence, it appears that a vast majority of the Ristine farmers have pledged by delivery

and endorsements their warehouse receipts to Commodity Credit Corporation and have not redeemed the same at the time of this hearing. Under Missouri law, it is clear that the Trustee and/or the debtor entities would not be obligated to return any agricultural commodities to these farmers absent a tender of the outstanding negotiable warehouse receipt.

6. Although there has been much argument and testimony concerning the legitimacy or validity of warehouse receipts allegedly issued to First Tennessee Bank, N.A.—Memphis by Cox Cotton Company on forms apparently not approved and authorized by the Department of Agriculture of the State of Missouri, nevertheless a full determination of the validity, nature, and extent of the claims of First Tennessee Bank under said warehouse receipts must await some later determination after a full evidentiary hearing. It is clear that First Tennessee Bank, N.A.—Memphis is making a valid, bona fide claim under said warehouse receipts which are included in their proof of claim filed against Frisbee Cotton Company herein. At least some of these warehouse receipts were executed by Don James, without question one of the partners in Frisbee Cotton Company, a general partnership. There is no evidence in the record that First Tennessee Bank, N.A.—Memphis did not make the outstanding loans in question in good faith to Frisbee Cotton Company. The original loan was $500,000 but is presently less than that as to principal. There is no question but that the money was disbursed to this debtor entity. There is no evidence in this record that said claim has been waived and/or abandoned by this creditor. At the hearing, one of the attorneys for First Tennessee Bank, N.A.—Memphis, Craig Donaldson, in open Court offered to produce the oral testimony of an officer of the bank but it was stated to the Court that said testimony would only be duplicitous of evidence already in the record regarding

the Bank's claim under the warehouse receipts covering the Missouri grain. The Court finds from the undisputed evidence that the Bank has alleged negotiable warehouse receipts covering 8,000 bushels of wheat and 10,500 bushels of soybeans at Ristine; 12,500 bushels of soybeans and 24,600 bushels of milo at Holcomb; 54,000 bushels of milo at Caruthersville; and 25,000 bushels of wheat and 85,000 bushels of milo at Naylor. It is also clear to the Court that First Tennessee Bank, N.A.—Memphis and The Corning Bank, Corning, Arkansas, are claiming to have USS security interests in the debtors' inventory at all locations in Missouri including Ristine, Missouri. The Court knows, however, that these interests have been objected to by the Trustee and are likewise in dispute.

7. The Court is also convinced that at all other locations of Trustee's debtor entities (Naylor, Caruthersville, and Holcomb, Missouri), there is a shortage of grain which prevents the satisfaction of all adverse claims to said grain except for 364 bushels of wheat at Holcomb, Missouri, which apparently is not owned by any adverse claimant and is the undisputed property of the Trustee. Also, it appears at Caruthersville, Missouri, from the record there is a small overage of wheat sufficient in amount to fully satisfy claims of Commodity Credit Corporation assuming the quantity and quality of the grain is proper; but, this Court further finds that that particular creditor desires the wheat sold at Caruthersville along with all other grain in Missouri. Therefore, as a matter of fact, based on the testimony and the exhibits before this Court, there is not enough grain inventory on hand at any location with which to satisfy all outstanding adverse claims assuming their validity which this Court does not now determine and which has not yet been determined. No claims have been allowed by this Court with respect to any of the grain.

Also, at any given location, the grain could be short in both quantity and quality thereby further preventing redelivery.

8. From the record, it is also clear that a substantial amount of grain has been moved from the State of Arkansas to the State of Missouri apparently by the management of the Arkansas based debtor entity known as Cox Cotton Company. It is not clear to the Court the purpose of the movement of this grain interstate, but it is apparent that most if not all of the grain was moved to the Holcomb, Missouri, location of Frisbee Cotton Company. There is no clear evidence that any of the grain was moved from Arkansas to Ristine, Missouri. However, there is testimony before this Court indicating transfer of grain from Neelyville, Missouri (the location of James Agri-Center, Inc., a debtor-in-possession in a related James proceeding in this Court), to Holcomb, Missouri. This transfer consisted of approximately 22,000 bushels of soybeans. There is also some indication that grain which should be stored at Naylor, Missouri, in fact is now stored at Holcomb, Missouri, for whatever reason. Certain Arkansas farmers are claiming to have at least an equitable claim to the grain transferred from Arkansas to Missouri. The Court finds that the movement of some grain is shown from the testimony of the Trustee and an exhibit introduced through his testimony and other witnesses which only complicates the process of unraveling all of the claims to the grain. From the testimony and exhibits, in excess of 34,000 bushels of soybeans have been moved from Arkansas to Missouri, and apparently received at the Holcomb, Missouri, location of Frisbee Cotton Company. A small amount of wheat and milo apparently also was moved interstate from Arkansas to Missouri.

9. The Commodity Credit Corporation has filed extensive proofs of claims with the Trustee and with this Court against the Chapter 11 debtor entities being ad-

ministered by Trustee. This defendant has also filed responsive pleadings in this adversary proceeding detailing the basis of its claim to some of the Missouri grain in the elevators. All of the claims against the Missouri grain of the Commodity Credit Corporation are represented by warehouse receipts allegedly held outright by the Commodity Credit Corporation or pledged to it by certain farmers, primarily residents of Missouri, having claims to the Missouri grain. The Commodity Credit Corporation has possession of these warehouse receipts as security for outstanding loans to the farmers. The Court finds that the Commodity Credit Corporation apparently is claiming about 73% of all grain situated in the State of Missouri in the debtors' warehouses administered by Trustee. It is clear that the Commodity Credit Corporation as well as all other parties have a legitimate bona fide claim to a substantial amount of the Missouri grain. It is also clear that neither the Commodity Credit Corporation nor Missouri farmers have paid the Trustee any storage fees on the grain post-petition and for some time in certain instances pre-petition. The Trustee claims that approximately $450,000 in storage is due him as of this time from the depositors of the Missouri grain. Issues over the storage claims of the Trustee are pending in a related matter in this adversary proceeding.

10. Although the testimony as to the deterioration of the grain in Missouri is somewhat in conflict, the Court is persuaded and convinced that the Missouri grain cannot be preserved indefinitely without considerable risk to the quality of the grain and without substantial costs being incurred by Trustee in attempting to preserve the grain at each of the debtors' locations in Missouri. The undisputed testimony from Louis French and from the Trustee indicates a substantial ongoing cost of at least $16,000 per month in attempting to care for, preserve, and protect the

grain. No storage has been paid to the Trustee by the individual Missouri depositors or Commodity Credit Corporation after the filing of the petitions on August 11, 1980. It is obvious to the Court that a substantial economic burden exists with respect to the Trustee's ability to continue to store the grain. As the warm months of summer approach, further insect damage to the grain can be expected as well as problems with hot spots and further crusting of the grain. The Trustee in April of 1981 spent approximately $37,000 of the estates' funds to spray and treat the grain, said process having been done commercially by Terminex Company at the request of the Trustee. A future application will likely be necessary at considerable cost if the grain is not sold. It makes no sense to a court of equity that Trustee should be required to continue to store the grain awaiting some determination months or years in the future as to the exact ownership, lien claims, and other interests in and to the grain. Trustee cannot return the grain to any particular adverse claimant without considerable risk and perhaps personal exposure. This the Court will not require under these extraordinary circumstances.

11. The Court further finds from the testimony that the Trustee has been having minor security problems at the Ristine elevator with regard to petty thefts. It is not clear to the Court that these conditions are entirely related to the storage of the grain. The Court finds also from the undisputed testimony that the ongoing storage of the grain in the elevator facilities in Missouri of Trustee's debtor entities are probably inhibiting an early sale of these facilities although it can never be known for certain why a particular facility will not sell.

12. The Court further finds that on February 18, 1981, the United States Court of Appeals for the Eighth Circuit entered its Order authorizing and directing the Missouri

Farmers Association, Inc. through R. A. Young, Executive Vice President, to take possession of approximately 30,000 bushels of grain (soybeans) at that time in the possession of Wayne Cryts and others physically located in approximately 77 vehicles at the Missouri Farmers Association, Inc. exchange in Bernie, Missouri, and to hold said grain until further order of that Court. The order of the Eighth Circuit Court of Appeals recited the transfer of the grain was authorized without prejudice to any rights to the grain which existed prior to February 16, 1981. In said order, the United States Court of Appeals for the Eighth Circuit further directed that the Missouri Farmers Association, Inc. be paid its reasonable and customary handling and storage charges according to the posted tariff by the United States Marshals Service subject to appropriate reimbursement as may be determined at a later date. This Court finds that approximately 30,000 to 31,000 bushels of soybeans (the exact quantity depending upon records maintained by Missouri Farmers Association, Inc. at the Bernie, Missouri, facility) are within the jurisdiction of this Court and subject to valid orders of this Court for all purposes. The Court finds that all references herein to Missouri grain situated in Trustee's elevators in the State of Missouri shall also refer for all purposes to the above quantity of grain now in the physical custody of Missouri Farmers Association, Inc. at Bernie, Missouri.

From the above findings of fact, the Court makes the following conclusions of law:

1. That this adversary proceeding has been properly commenced by Trustee as plaintiff under the United States Bankruptcy Code, the Rules of Bankruptcy Procedure, and the Interim Bankruptcy Rules. That each party hereto has had actual due process notice of all formal pre-trial conferences and the hearing on this matter conducted May 18 and

19, 1981, at the U.S. Post Office and Courthouse Building, Little Rock, Arkansas.

2. That all issues with respect to whether Trustee should be permitted to sell the Missouri grain free and clear of liens and on what terms have been properly joined.

3. That this Court has jurisdiction over the relief requested by Trustee and all related matters in this adversary proceeding in accordance with 28 U.S.C. §1471; 28 U.S.C. §1480; 28 U.S.C. §1481; 11 U.S.C. §105; 11 U.S.C. §363; 28 U.S.C. §1651; and the applicable Rules of Bankruptcy Procedure and the Interim Bankruptcy Rules.

4. For purposes of 11 U.S.C. §363, property of the estate is involved as that term is defined under 11 U.S.C. §541. All grain in debtors' warehouses at Naylor, Ristine, Holcomb, and Caruthersville, Missouri, is property of the estate as is the approximately 31,000 bushels of soybeans stored in a Missouri Farmers Association, Inc. warehouse at Bernie, Missouri.

5. Under 11 U.S.C. §363(f)(4), Trustee may sell property of the estate free and clear of any interests in such property of an entity other than the estate if such interest is in bona fide dispute which as a matter of law this Court finds that Trustee has shown by a preponderance of the evidence and to the satisfaction of this Court as is required by the above section of the United States Bankruptcy Code.

6. There is sufficient evidence before the Court indicating that Trustee has a substantial ownership claim at each elevator maintained by the debtor entities in the State of Missouri in addition to a UCC lien claim for storage and perhaps other incidental claims to satisfy all requirements of 11 U.S.C. §363 and to permit Trustee to sell all grain free and clear of liens.

7. The interest in the grain at each location is in a

bona fide dispute as among various creditor claimants.

8. As a matter of law under various provisions of the Missouri Uniform Commercial Code and the Missouri Grain Warehouse Law for purposes of 11 U.S.C. §363(f)(5), various entities claiming the grain could be compelled in a legal or equitable proceeding to accept a money satisfaction of such interest. That the provisions of Missouri law which cause this Court to reach this conclusion are fully set forth in the pre-trial brief of the Trustee and include Missouri Revised Statutes 400.7-206; 400.7-209; 400.7-210; 411.519(6); and 411.671. That under the laws and the statutes of the State of Missouri, as a matter of law the Trustee in this type of situation (where in addition the warehouseman can compel interpleader relief under Missouri Revised Statute 411.7-603) can compel the adverse claimants to the grain to take a money satisfaction of their interests. The Court concludes that any other conclusion of law would be inappropriate under the peculiar facts and circumstances of this proceeding and would subject Trustee to possible multiple liability and even personal exposure should this Court hold otherwise.

9. The Court further finds as matter of law under the peculiar facts and circumstances of this adversary proceeding and based on the evidence before this Court and even should this question not be governed under Missouri substantive law, nevertheless, under principles of law applicable to general equitable proceedings, and in particular applicable to interpleader relief proceedings, the Trustee could not feel secure in distributing the grain to one group or class of adverse claimants well knowing that other adverse claimants were making good faith conflicting claims to the same property. Under the circumstances, this Court feels that any court of equity using its inherent equitable powers would order the grain sold.

10. The Court further concludes as a matter of law that not only would it unduly complicate matters for the Trustee to even attempt to make a redelivery of the grain, but the same could well expose him to personal liability and favor one class of claimants over another since no claims to the grain have yet been finally adjudicated by this Court as to validity, nature, priority, and/or value. The Trustee simply does not know to any reasonable degree of certainty what amount of grain the debtor entities started with at each location and the Trustee has no way of knowing in any exact sense the present quantity or quality of the grain at each location. The Court also knows from the testimony that it will take four (4) to six (6) months to sell, deliver, and receive payment of the grain if the process is started in the immediate future. During this period of time, the quality of the grain could well change and the condition of the grain could well deteriorate further. Should redelivery of the grain occur, the first few recipients might well receive a fair quantity of the grain in good condition but later recipients might not receive any grain or it any at all and it could be in a vastly different and/or inferior condition. At the end of the redelivery process, there might not be enough grain to cover all demands. The Court rejects this proposal and contention of certain Missouri farmers as being totally inequitable and impractical under the circumstances and the evidence presented.

11. The Court further concludes as a matter of law that under 11 U.S.C. §506(c), Trustee is entitled to recover from the property sold all reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim. The Court will not award to Trustee at this time or assess against the sale proceeds of the grain any amount for Trustee's fees, attorneys' fees, or accountants' fees. These issues shall be expressly reserved for determination by this

Court or a master appointed by this Court at some later time. The Court does know, however, that Trustee will incur substantial direct expenses in selling the Missouri grain and that many problems will be encountered by Trustee in selling, marketing, and delivering the Missouri grain over the next four to six months. Therefore, the Trustee be and he hereby is specifically authorized to deduct from the gross sale proceeds and deposit to his regular operating account or accounts such sums as are the reasonable and necessary costs and expenses from and after May 19, 1981, of preserving and disposing of the commodities as authorized by 11 U.S.C. §506(c). Trustee is ordered to keep a careful record and accounting of all such reasonable and necessary costs and expenses and to report the same to this Court in the course of the filing of his interim operating reports.

12. The Court further concludes as a matter of law that the sale proceeds of the grain must be kept separate by commodity and by location and that Trustee in the course of the sale of the commodities in question at each location shall maintain and establish separate books and accounts for the proceeds of the sale by location and by commodity. An inspection of the Trustee's books and accounts may be made by any attorney representing any defendant hereto upon reasonable request being made and notice given to the Trustee or his accountants or attorneys.

13. The Court further concludes as a matter of law that as to specific guidelines as to when, how, and in what manner the Trustee should sell the Missouri grain, this Court shall not specifically so determine. The Court concludes as a matter of law that the Trustee, Robert P. Lindsey, should be given broad powers and discretion in selling and marketing the Missouri grain in question and that Trustee, using his best judgment and in a prudent

manner, should determine the method, manner, and timing of the sale of the commodities. In this regard, as a matter of law, this Court expects Trustee to be guided in part by the terms, provisions, and conditions, of *Ark. Stat. Ann.* §58-302 dealing with the "exercise of judgment and care required" by fiduciaries and trustees handling trust estates. The Court further finds and concludes as a matter of law that the Trustee shall also be guided by other general equitable principles governing duties and responsibilities required of trustees in administering estates not only under the above provisions of Arkansas law but also under relevant and appropriate provisions of Missouri law and under the United States Bankruptcy Code governing responsibilities of fiduciaries in disposing of personal property in similar situations.

14. The Court further concludes as a matter of law that the Trustee should and must invest and reinvest, using his best judgment and discretion, all of the net sale proceeds in one or more certificates of deposit or other interest bearing obligations all as authorized and pursuant to 11 U.S.C. §345 dealing with "money of estates". This Court will not designate nor prescribe the institution or institutions in which Trustee should invest and reinvest said funds and will not prescribe the mode or manner of such investments. Trustee shall be permitted to select the institution or institutions in which said funds must be invested but shall maintain careful books and records of such investments by commodity and by location at all times. Trustee is ordered to make certain that the financial institution or institutions in which said funds are invested fully comply with all the requirements of 11 U.S.C. §345 with respect to deposit of funds with the Federal Reserve Bank in their locale.

15. The Court further concludes as a matter of law

that Trustee be and should be authorized to employ additional clerical help, assistance, and labor as may be reasonably necessary to carry out the terms and provisions of this Memorandum Opinion and orders entered pursuant hereto authorizing the sale of all grain situated in debtors' warehouses in the State of Missouri and the grain stored at Bernie, Missouri, in a Missouri Farmers Association, Inc. facility so that proper and carefully maintained records may be in existence for inspection and review as above set forth.

16. The Court further concludes as a matter of law that the existing $1 million bond of the Trustee is adequate under the circumstances, but will, upon request being made at some later time by any interested party or entity, consider increasing the bond. The Court does conclude, however, that any increase in Trustee's bond premium attributable directly to increased cash funds coming into his hands arising from the sale of the Missouri grain shall be assessed against the sale proceeds of the Missouri grain.

17. The Court further concludes as a matter of law that "adequate protection" under 11 U.S.C. §361 has been met and satisfied by Trustee since this Court concludes as a matter of law that all ownership claims, lien claims, UCC security interests, equitable claims, storage claims, landlord claims, and whatever other claims may exist to the net sale proceeds shall specifically attach to said proceeds and shall be fully heard and determined by this Court at some later time pursuant to the appropriate notice and opportunity for hearing consistent with the needs of the parties and their attorneys.

18. Separate orders will be entered by this Court consistent with this Memorandum Opinion authorizing the sale of all Missouri grain free and clear of liens and interests at each location of the debtor entities being administered by Trustee.

DATED at Little Rock, Arkansas, this 27 day of May, 1981.

/s/ Charles W. Baker
Charles W. Baker, Bankruptcy Judge

cc: Robert P. Lindsey, Trustee
Ben F. Arnold, Esq.
Warren Dupwe, Esq.
A. Jan Thomas, Jr., Esq.
Richard Steele, Esq.
Mr. Louis French
Gerald Dudley, C.P.A.
Scott Manatt, Esq.
Bill Bristow, Esq.
Robert Branch, Esq.
Bob Ross, Esq.
William F. Kirsch, Esq.
Craig Donaldson, Esq.
Donald McCartney, Esq.
Claude Skelton, Esq.
Baker Kurrus, Esq.
Richard L. Ramsay, Esq.
Richard Jones, Esq.
O. H. Storey, III, Esq.
Arnold Grundeman, Esq.
John Burris, Esq.
Joe Morphew, Esq.
John A. Clark, Esq.
Vernon J. King, Esq.
C. W. Knauts, Esq.
Guy Brinkley, Esq.
W. J. Walker, Esq.
James F. Gunn, Esq.
Gerald Sill, Esq.
Robert L. Brown, Esq.

Fred Harrison, Esq.
All Attorneys of Record
All Debtors
All Creditors Committees
Mr. George Proctor, U.S. Attorney
Securities and Exchange Commission
Paul D. Williams, District Director, IRS
U.S. Treasury Department

APPENDIX L

IN THE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE: COX COTTON COMPANY d/b/a JAMES GRAIN & COTTON CO. *Debtor*	No. J-80-154-B
IN RE: DON JAMES, ROBERT JAMES and G. E. JAMES, a general partnership, d/b/a/ FRISBEE COTTON COMPANY; JAMES GRAIN & ELEVATOR *Debtor*	No. J-80-155-B

ROBERT P. LINDSEY, TRUSTEE ..... *Plaintiff*

v. Adv. Proc. No. 800414

FIRST TENNESSEE BANK, N.A. — MEMPHIS, a national banking association, *et. al.* ..... *Defendants*

ORDER AUTHORIZING TRUSTEE TO SELL SOYBEANS SITUATED IN MISSOURI FARMERS ASSOCIATION, INC. ELEVATOR AT BERNIE IN THE STATE OF MISSOURI

In accordance with and pursuant to the Memorandum Opinion of this Court dated May 27, 1981, finding that Trustee should be authorized to sell all grain situated in an Missouri Farmers Association, Inc. elevator at Bernie,

Missouri, free and clear of liens pursuant to 11 U.S.C. §363(f)(4)(5) and pursuant to inherent equitable powers of a court of equity possessed by this Court under 28 U.S.C. §1481 and pursuant to interpleader relief available to Trustee in a court of equity.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, AND DECREED that Robert P. Lindsey, Trustee for each of the above captioned debtor entities, be and he hereby is authorized to sell free and clear of all liens and interests for the highest and best cash price obtainable consistent with this Court's Memorandum Opinion dated May 27, 1981, and the restrictions therein contained, all soybeans now stored at the Missouri Farmers Association, Inc. elevator facility at Bernie, Missouri, and originally deposited at said elevator on or about February 18, 1981, by Wayne Cryts and others, said quantity of soybeans amounting to approximately 30,000 bushels, upon terms consistent with the above Memorandum Opinion of this Court, with all ownership claims, UCC security interests, UCC storage liens, landlords' liens, equitable claims, encumbrances, and otherwise to attach to the net sale proceeds so that said claimants may be assured of "adequate protection" under 11 U.S.C. §361; Trustee is further ORDERED to maintain a separate accounting with respect to the net sale proceeds received from the sale of this quantity of soybeans, it appearing to the Court that said soybeans were removed by defendant, Wayne Cryts, and other persons from the Ristine elevator facility of Frisbee Cotton Company on or about February 16, 1981, and delivered to the above Missouri Farmers Association, Inc. facility at Bernie, Missouri, on or about February 18, 1981.

IT IS SO ORDERED.

ENTERED at Little Rock, Arkansas, this 27 day of May, 1981.

/s/ Charles W. Baker
Charles W. Baker, Bankruptcy Judge

cc: Robert P. Lindsey, Trustee
Ben F. Arnold, Esq.
Warren Dupwe, Esq.
A. Jan Thomas, Jr., Esq.
Mr. Louis French
Gerald Dudley, C.P.A.
Scott Manatt, Esq.
Robert Branch, Esq.
Bill Bristow, Esq.
Bob Ross, Esq.
William F. Kirsch, Esq.
Craig Donaldson, Esq.
Donald McCartney, Esq.
Claude Skelton, Esq.
Baker Kurrus, Esq.
Richard L. Ramsay, Esq.
Richard Jones, Esq.
O. H. Storey, III, Esq.
Arnold Grundeman, Esq.
John Burris, Esq.
Joe Morphew, Esq.
John A. Clark, Esq.
Vernon J. King, Esq.
C. W. Knauts, Esq.
Guy Brinkley, Esq.
W. J. Walker, Esq.
James F. Gunn, Esq.
Gerald Sill, Esq.
Robert L. Brown, Esq.

Fred Harrison, Esq.
All Attorneys of Record
All Debtors
All Creditors Committees
Mr. George Proctor, U.S. Attorney
Securities and Exchange Commission
Paul D. Williams, District Director, IRS
U.S. Treasury Department

APPENDIX M

IN THE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE:
COX COTTON COMPANY d/b/a JAMES GRAIN & COTTON CO.
Debtor

No. J-80-154-B

IN RE:
DON JAMES, ROBERT JAMES and G. E. JAMES, a general partnership, d/b/a/ FRISBEE COTTON COMPANY; JAMES GRAIN & ELEVATOR
Debtor

No. J-80-155-B

ROBERT P. LINDSEY, TRUSTEE ..... *Plaintiff*

v. Adv. Proc. No. 800414

FIRST TENNESSEE BANK, N.A. — MEMPHIS, a national banking association, *et. al.* ..... *Defendants*

ORDER AUTHORIZING TRUSTEE TO SELL GRAIN SITUATED IN DEBTORS' ELEVATORS IN NAYLOR, MISSOURI

In accordance with and pursuant to the Memorandum Opinion of this Court dated May 27, 1981, finding that Trustee should be authorized to sell all grain situated in the debtors' elevators for which he is Trustee in the State of Missouri free and clear of liens pursuant to 11 U.S.C. §363(f)(4)(5) and pursuant to inherent equitable powers

of a court of equity possessed by this Court under 28 U.S.C. §1481 and pursuant to interpleader relief available to Trustee in a court of equity,

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, AND DECREED that Robert P. Lindsey, Trustee for each of the above captioned debtor entities, be and he hereby is authorized to sell free and clear of all liens and interests for the highest and best cash price obtainable consistent with this Court's Memorandum Opinion dated May 27, 1981, and the restrictions therein contained, all milo presently situated at Trustee's elevator facility at Naylor, Missouri, with the net proceeds from the sale of the grain from said elevator facility to be held, invested, and reinvested by Trustee consistent with the terms of the above Memorandum Opinion and with all valid ownership claims, UCC security interests, storage liens, landlords' liens, equitable liens, and other encumbrances to specifically attach to the net sale proceeds all as permitted by 11 U.S.C. §363(f) so that all claimants may be assured of "Adequate protection" under 11 U.S.C. §361 pending further orders of this Court; Trustee is further ORDERED to maintain separate books and records for each commodity sold at said elevator location.

IT IS SO ORDERED.

/s/ Charles W. Baker
Charles W. Baker, Bankruptcy Judge
DATE: May 27, 1981

cc: Robert P. Lindsey, Trustee
Ben F. Arnold, Esq.
Warren Dupwe, Esq.
A. Jan Thomas, Jr., Esq.
Mr. Louis French
Gerald Dudley, C.P.A.

Scott Manatt, Esq.
Robert Branch, Esq.
Bill Bistrow, Esq.
Bob Ross, Esq.
William F. Kirsch, Esq.
Craig Donaldson, Esq.
Donald McCartney, Esq.
Claude Skelton, Esq.
Baker Kurrus, Esq.
Richard L. Ramsay, Esq.
Richard Jones, Esq.
O. H. Storey, III, Esq.
Arnold Grundeman, Esq.
John Burris, Esq.
Joe Morphew, Esq.
John A. Clark, Esq.
Vernon J. King, Esq.
C. W. Knauts, Esq.
Guy Brinkley, Esq.
W. J. Walker, Esq.
James F. Gunn, Esq.
Robert L. Brown, Esq.
Fred Harrison, Esq.
All Attorneys of Record
All Debtors
All Creditors Committees
Mr. George Proctor, U.S. Attorney
Securities and Exchange Commission
Paul D. Williams, District Director, IRS
U.S. Treasury Department

APPENDIX N

IN THE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF ARKANSAS

Jonesboro Division

IN RE: DON JAMES, ROBERT JAMES and G. E. JAMES, a general partnership, d/b/a FRISBEE COTTON COMPANY; JAMES GRAIN & ELEVATOR *Debtor*	No. J-80-155-B

AGREEMENT FOR PURCHASE AND SALE OF MILO, SOYBEANS, WHEAT, AND CORN ("AGREEMENT")

This Agreement made and entered into this 24th day of June, 1981, by and between Robert P. Lindsey, Chapter 11 Reorganization Trustee for Don James, Robert James, and G. E. James, d/b/a Frisbee Cotton Company and James Grain & Elevator a/k/a James Gin & Elevator, general partnerships, (hereinafter referred to as "Trustee"); and, Bearhouse, Inc., an Arkansas corporation, (hereinafter referred to as 'Buyer");

WITNESSETH:

WHEREAS, the United States Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, did on May 27, 1981, enter its Orders authorizing Trustee to sell all grain situated in debtors' elevators in Caruthersville, Missouri; Holcomb, Missouri; Ristine, Missouri; and

Naylor, Missouri, including, but not limited to all milo, soybeans, wheat, and corn situated in said elevators free and clear of all liens; and

WHEREAS, said Orders are now final and non-appealable; and

WHEREAS, Trustee desires to sell and Buyer desires to purchase all milo, soybeans, wheat, and corn situated in Trustee's elevators and warehouse facilities owned and/or leased by Frisbee Cotton Company and James Gin & Elevator at the above locations in Missouri; and

WHEREAS, Trustee does not have sufficient expertise, labor, transportation, and liquid funds with which to sell and market the above grain without considerable burden on the estates of Frisbee Cotton Company and James Gin & Elevator; and

WHEREAS, Buyer and in its individual representatives have considerable experience and expertise in the merchandising and delivery of grain of all kinds; and

WHEREAS, Buyer on or about March 16, 1981, entered into a previous Agreement for Purchase and Sale of Milo with Trustee for the purchase and sale of all milo situated at West Memphis, Arkansas, in one of Trustee's Arkansas warehouses; and

WHEREAS, Buyer to date has substantially performed all of its obligations under the terms of that particular Agreement for Purchase and Sale of Milo;

NOW, THEREFORE, the parties agree as follows:

1. Trustee agrees to sell and Buyer agrees to purchase all milo, soybeans, wheat, and corn situated in warehouses and elevators owned and/or leased by Frisbee Cotton Company and James Gin & Elevator at various locations in Missouri on the basis "as it is" and "where it is"

as those terms are customarily used and understood in the grain industry. Buyer agrees to pay Trustee a price of $3.60 per hundredweight (CWT) for milo and/or grain sorghum; $6.71 per bushel for soybeans, save and except soybeans claimed to be owned by Trustee which formerly were situated at Trustee's warehouse at Ristine, Missouri, but which are now located at an MFA warehouse at Bernie, Missouri and which are not part of the grain to be purchased and sold; $4.00 per hundredweight (CWT) for corn; and $3.08 per bushel for wheat. For purposes of this Agreement, the grade or grades of the grain shall not be a factor in determining the price to be paid Trustee by Buyer. Also, for purposes of this Agreement, all standard weights designated by the United States and in particular the Department of Agriculture of the United States and any instrumentalities thereof shall be in full force and effect and shall govern.

2. Trustee shall furnish at his expense at the points of origin (warehouses of the debtor entities at various locations in the State of Missouri) a person experienced in weighing grain. In the event there should be a disagreement between the parties over specific weights of the grain at either the points of origin or the points of destination, Trustee and Buyer agree to submit the matter for determination before the United States Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, having jurisdiction of the above captioned Chapter 11 proceedings for the debtor entities. Trustee and Buyer agree and acknowledge that the above Court shall have exclusive jurisdiction over all matters in this Agreement. In all cases where grain is weighed by a U.S. Federal weigher and/or inspector, his certification will be binding on the parties.

3. Buyer agrees with Trustee that it will furnish all

labor, expertise, equipment, and transportation necessary to remove the grain from Trustee's warehouses at various locations in the State of Missouri and transport the same at Buyer's expense to the destinations for the grain selected by Buyer. For all purposes under this Agreement, Buyer shall act as an independent contractor and in no event shall be construed to be an agent, servant, or employee of Trustee for any purpose or for any reason. Buyer shall select its own methods and procedures and shall use its own equipment for removal of the grain from Trustee's warehouses and elevators in the State of Missouri. Trustee shall have no right to determine or direct the actions of Buyer in removing the grain, subject, however, to a determination by Trustee of the warehouses and elevator facilities first to be emptied under the terms of this Agreement.

4. Buyer agrees to hold Trustee harmless and indemnify Trustee, his agents, servants, and employees, and the above debtor entities of and from any and all claims, demands, actions, or causes of action arising out of or in any manner connected with Buyer's operations and/or performance under this Agreement including, but not limited to, injury or damage to persons or property of persons not parties to this Agreement. Buyer agrees to carry its own Workers' Compensation coverage required by the laws of the State of Missouri, general liability coverage, and to require its purchaser or purchasers to insure the grain for its full value or have it under a bill of lading until it has been paid for in full. Buyer agrees to furnish Trustee or his designated representative with a certificate of insurance for each of the above types of insurance coverage satisfactory in amounts and terms to Trustee. All insurance must be underwritten by insurance companies qualified to transact insurance business within the State of Missouri.

5. Buyer agrees to and shall furnish Trustee with satisfactory written proof that it has established an irrevocable line of credit equal to at least $500,000 which shall remain in full force and effect during the full existence of this Agreement and until said Agreement is terminated by the parties or by the United States Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division. Buyer shall furnish Trustee with the name and address of its banking institution at which the line of credit has been established. Trustee shall have the right and privilege of drawing drafts against said line of credit at said bank at least weekly and more often if the amount to be drawn exceeds $25,000. Buyer agrees to secure in part its obligations under this Agreement by an irrevocable letter of credit to be issued by Buyer's bank in favor of Trustee in an amount not less than $500,000. Trustee, in the event of a default under this Agreement by Buyer, shall have the right to be paid from said letter of credit as it may be replenished all such sums due him arising from Buyer's default. Buyer agrees to have the letter of credit replenished in the event of payments thereunder to Trustee so that at all times herein mentioned Trustee will be protected in an amount not less than $500,000 and Buyer's bank will be liable to him at all times in at least that amount.

6. Trustee and Buyer agree that Trustee shall be permitted to draw 90% of each dollar amount of grain sold by Trustee to Buyer and represented by state or federal documents showing the weights for each shipment. The balance of each grain shipment shall be settled on as soon as possible and the proceeds remitted to Trustee by Buyer.

7. Buyer shall have ninety (90) days after July 13, 1981, within which to remove all grain from Trustee's warehouses and elevator facilities at various locations in

the State of Missouri. For each day thereafter any grain shall remain in any of Trustee's warehouses and elevator facilities in the State of Missouri, Buyer shall pay to Trustee as liquidated damages the sum of $100 per day per warehouse and/or elevator facility.

8. Buyer agrees to surrender possession of the warehouses to Trustee in as good a condition as the warehouses were in at the time of the commencement of this Agreement, ordinary wear and tear excepted. Any physical damage to the warehouses caused by Buyer, its agents, servants, employees, invitees, permittees, or guests shall be repaired by Buyer at its expense.

9. Trustee shall be obligated to provide fire, windstorm, and other similar type casualty insurance on the Missouri warehouses at all times during the existence of this Agreement.

10. This Agreement constitutes the entire agreement between the parties. No oral statements or representations not reduced to writing herein shall be binding on the parties.

11. In the event the above captioned Chapter 11 proceeding for Frisbee Cotton Company and James Gin & Elevator shall be converted from a Chapter 11 proceeding to a Chapter 7 proceeding, Trustee and Buyer agree that any such conversion shall have no bearing and effect upon the obligations of the parties under this Agreement which shall continue and remain the same. The parties hereto shall not attempt to reject this Agreement as an "executory contract" under 11 U.S.C. §365 of the United States Bankruptcy Code or any other applicable provision of federal or state law.

12. The parties agree that this Agreement shall be construed and governed in accordance with the laws of the

State of Arkansas to the extent not in conflict with the United States Bankruptcy Code, the Rules of Bankruptcy Procedure, and the Interim Bankruptcy Rules.

13. In the event of a breach of any covenant of this Agreement by Buyer or in the event of default for any reason of any of the terms of this Agreement by Buyer, except for acts of God or government or delays caused by strikes, storms, shortage of cars, embargos, or any contingency beyond Buyer's control, Trustee shall have the right to terminate immediately this Agreement without notice to Buyer who shall have no further rights hereunder. Trustee shall thereafter be permitted to resell any remaining grain to a buyer or buyers of his choice with no further obligations to Buyer. In the event of any resale of the grain by Trustee, Buyer acknowledges that it will have no right, title, interest, claim, or equity in and to said grain and/or the sale proceeds.

14. For purposes of this Agreement, the singular includes the plural and the plural includes the singular.

15. Trustee and Buyer agree and acknowledge that the terms and conditions of this Agreement have been fully explained to them by their legal counsel, that they are familiar with all the terms of this Agreement, that they understand the same, and that they have entered into this Agreement of their own free will and not under any compulsion or duress.

16. Buyer agrees with Trustee that it will comply with and obey all laws, regulations, and statutes of the State of Missouri and of any county and/or municipality thereof in which the obligations of this Agreement are to be performed by Buyer to the end that no legal proceedings shall be brought against Trustee and/or Buyer by any governmental unit situated in the State of Missouri.

17. Buyer further agrees to commit no waste in or upon the warehouse and/or elevator facilities of Trustee situated at various locations in the State of Missouri and agrees not to carry on any unlawful activity at such locations.

DATED and entered into at Little Rock, Arkansas, this 26 day of June, 1981.

/s/ Robert P. Lindsey, Trustee
Robert P. Lindsey, Chapter 11 Trustee
for Don James, Robert James, and
G. E. James, d/b/a Frisbee Cotton
Company and James Gin & Elevator

WITNESS:
/s/ Reba L. Mangum

BEARHOUSE, INC., an Arkansas
corporation
By: /s/ Thomas C. Couch, Pres.
President

ATTEST:
/s/ Richard E. Griffin
Secretary

Office - Supreme Court, U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IN RE STATE OF MISSOURI, ET AL.,
Petitioners,

v.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
AND THE
HONORABLE CHARLES W. BAKER, ET AL.,
Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BILL W. BRISTOW
Seay & Bristow
216 East Washington
Jonesboro, AR 72401
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No. 81-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IN RE STATE OF MISSOURI, ET AL.,
Petitioners,
v.
UNITED STATES BANKRUPTCY COURT
FOR THE EASTERNI DISTRICT OF ARKANSAS
AND THE
HONORABLE CHARLES W. BAKER, ET AL.,
Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM FINAL JUDGEMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

This supplemental brief of Respondents/Intervenors ("Arkansas Farmers") and Respondent/Trustee, Robert P. Lindsey, ("Trustee") seeks to comment on matters raised in Petitioners' First and Second Supplemental Briefs dated respectively August 12, 1981, and December 3, 1981; Petitioners' Reply Brief dated September 14, 1981; and Petitioners' Reply to Brief for the United States dated December 23, 1981.

It is undisputed that Trustee's Missouri Chapter 11 partnership debtor entities (Frisbee Cotton Company and James Gin & Elevator), had actual exclusive possession of all Missouri grain in their own elevator facilities as of the

date of the filing of the voluntary Chapter 7 petitions on August 11, 1980. On September 22, 1980, the Chapter 7 cases were converted to Chapter 11 proceedings. For the first time in their December 23, 1981, Reply Brief, Petitioners absurdly argue that a voluntary surrender by debtors of their Missouri grain warehouses under threats of intimidation on August 8, 1980, gave Petitioners "legal control" over the Missouri grain prior to the filing of the petitions. This action of the individual James Brothers was not binding on the Bankruptcy Court or the Trustee upon the voluntary petitions being filed on August 11, 1980. Petitioners did not seek to obtain the *ex parte* Missouri state court receivership orders authorizing them to seize the grain warehouses until August 12, 1980, and only then upon learning of the filing of the petitions. Petitioners never seriously until now have questioned Trustee's possessory interest in the Missouri grain. Possession of the grain has always been conceded in Trustee for the debtor entities and could have been compelled by him in any event by invoking 11 U.S.C. §542 and 11 U.S.C. §543 requiring custodians and/or third parties to turn over property of the estate. Postpetition with the knowledge and acquiescence of Petitioners, the debtors' employees continued in actual possession of the elevators, treated and turned the grain, and performed other functions of a grain warehouseman. Petitioners had neither actual nor constructive possession of the grain or the elevators. On August 15, 1980, Trustee was authorized by an Order of the Respondent Bankruptcy Court to operate the businesses of the debtors. Petitioners at all times wholly lacked dominion and control factually and legally over the debtors' operations. Therefore, by operation of 11 U.S.C. §541, the Missouri grain became property of the estate of these debtor entities since an estate was created by the commencement of the case under 11 U.S.C. §541(a). Further, under 11 U.S.C. §541(a)(1),

all legal or equitable interests of the debtor in property as of the estate. Petitioners surely do not seriously contend that they had actual physical possession of any of the Missouri grain as of date of the filing of the petitions. Under 11 U.S.C. §541 and 28 U.S.C. §1471, mere possession of property is sufficient to invoke the jurisdiction of bankruptcy courts under the Bankruptcy Reform Act of 1978. *In the Matter of GSVC Restaurant Corp.*, 1 *Collier Bankruptcy Cases*, 2d series, at page 727. At the time of the filing of the Chapter 7 petitions for the above Missouri partnership debtor entities, according to Petitioners' own audit reports approximately 1,071,604 bushels of milo, 150,269 bushels of soybeans, 43,313 bushels of corn, and 2,599 bushels of wheat were situated in the debtors' Missouri elevator facilities. At that time, and for several months thereafter, it was believed that the value of the Missouri grain was approximately $5 million. However, subsequent declines in market prices of the grain; actions of Petitioners; quality deterioration; and, some unauthorized removal of the grain have resulted in the present value of the net grain sale proceeds being approximately $3 million with interest.

Petitioners have already conceded in oral argument, in their pleadings, and from their own records and grain audit reports that Trustee on behalf of his debtor entities owns at least 2.3% of the Missouri grain. However, Trustee's entire interest in the Missouri grain sale proceeds is far greater. Pre-petition, the Missouri debtor entities administered by Trustee entered into several Uniform Grain Storage Agreements with Commodity Credit Corporation (an instrumentality of the United States and by far the largest adverse claimant to the Missouri grain in terms of bushels and dollars) for long term grain storage. Also, the Missouri debtor entities pre-petition entered into storage contracts with individual Missouri and Arkansas farmers. As of October 31, 1981, it was generally

conceded exclusive of set-off claims by the major adverse claimants to the Missouri grain that Trustee's accrued but unpaid storage charges (pre and post-petition) amounted to not less than $565,922.54. These storage charges were secured by an Article 7 Uniform Commercial Code storage lien (UCC 7-209) in favor of Trustee for the debtor entities. Therefore, Trustee has an Uniform Commercial Code lien on all Missouri grain for the accrued but unpaid storage charges due his debtor entities in addition to his outright ownership of a substantial amount of the grain. This lien may be enforced under UCC 7-210.

Further, under 11 U.S.C. §506(c), Trustee is entitled on behalf of his Missouri partnership debtor entities to recover "the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit of the holder of such claim." Trustee has determined that the gross amount of these post-petition costs and expenses attributable to the Missouri grain due him as of October 31, 1981, will amount to at least $902,298.56 when Trustee's fees, attorneys' fees, accounting fees, security expenses, trucking, fuel expense, interest, taxes, insurance and bond premiums, chemicals, insecticides, preservatives, labor, utilities, and the like, are fully considered. Therefore, Trustee's total present economic interest in the Missouri grain is at least $1,537,221.10 which Trustee can fully support by competent proof and evidence. Petitioners know this but are reluctant to discuss this aspect of the case in their supplemental briefs filed with this Court.

Petitioners contend that it is significant that the Eighth Circuit Court of Appeals found that the Trustee presented no documents of title to substantiate his claim of ownership of the Missouri grain. Under Petitioners' own Missouri Grain Warehouse Law, such presentation of documents of title is not required when the grain records of the ware-

houseman show an excess of grain by measurement at certain individual warehouses sufficient to meet all claims of receipt or scale ticket holders. See §411.517 of Missouri Grain Warehouse Law. Petitioners' own audit records indicate at various of the warehouses an overage position which under their own Missouri Grain Warehouse Law constitutes owned property of the warehouseman. Thus, no separate warehouse receipts or other documents are required.

Throughout their original petition and supplemental briefs, Petitioners leave the impression that it has already been determined that Trustee's ownership interest in the grain does not exceed 2.3%. Such contention is totally without merit. The conflicting ownership claims to the grain, the UCC security interest claims to the grain of First Tennessee Bank N.A.-Memphis, UCC Article 7 storage lien claims to the grain, equitable claims to the grain, and other claims including tracing claims have not yet been heard and determined by any court pending Trustee's filing of his Joint Plan of Reorganization which will dispose of all complex factual and legal issues over not only the Missouri grain, but also the Arkansas grain and all other property of the debtors' estates. Should the Trustee's Joint Plan of Reorganization be confirmed, all disputes relative to the Arkansas and Missouri grain will be resolved and claimants paid pursuant to the terms of the Trustee's Joint Plan. If not, incredibly complex issues of law and fact will have to be resolved by whatever court or courts of competent jurisdiction are finally determined to have subject matter jurisdiction over the Missouri grain sale proceeds. Trustee has taken the position that in the event of such extended litigation, it will be determined that the debtor entities own outright considerably more than 2.3% of the Missouri grain. It appears that some of the alleged negotiable warehouse receipts held by Missouri and Arkan-

sas farmers and Commodity Credit Corporation may not, as to form and substance, comply with Missouri law—§411.381 of Missouri Grain Warehouse Law. Also, some of the Missouri grain claimed by farmers is apparently pursuant to written contracts of sale. Title to this grain is vested in the debtors' estates and not the farmers. In addition, it appears that some Missouri farmers have "priced" their grain after depositing the same into the debtors' elevator facilities, thereby causing title to the grain to pass to Trustee's debtor entities. It also appears that Trustee has title to other quantities of Missouri grain since the parties to the transactions intended that a present "sale" would take place upon the grain being deposited into the Missouri warehouse and not a bailment. The price was to be set later by the farmer under UCC 2-305; and, under UCC 2-401(2) title to the grain passed immediately to Trustee's debtor entities. In short, difficult questions of law and fact requiring much testimony as to course of dealing and usage of trade under UCC 1-205 will be necessary to determine on a case by case basis each individual's claim to a kind of grain at a particular location. Petitioners would have this Court believe that such a process will be simple and expeditious. Nothing could be further from the truth. The process will be tedious, expensive, time consuming (12 weeks or more), and will likely cost the grain claimants at least $150,000 when the services of a master and his staff are considered. Respondent, Bankruptcy Court, has already appointed a master to hear and determine all adverse claims to the Arkansas and Missouri grain should such determination be necessary. Trustee anticipates that as a result of such complex litigation, if necessary, the debtors' ownership interests in the Missouri grain will increase substantially in comparison to the amount already conceded by Petitioners. Trustee, of course, is entitled to have these claims litigated in the Bankruptcy

Court under 28 U.S.C. §1471, 28 U.S.C. §1481, 11 U.S.C. §541, and 11 U.S.C. §362(a).

The grant of subject matter jurisdiction to bankruptcy courts under 28 U.S.C. §1471 is so broad and pervasive that almost any aspect or feature of a bankruptcy case can now be adjudicated and determined by the Bankruptcy Court—Legislative History to 28 U.S.C. §1471. It is, of course, well established that a bankruptcy court has jurisdiction to determine whether it has jurisdiction to enjoin a state prosecution—*Matter of Barth*, 2 *Collier Bankruptcy Cases*, 2d series, at page 1030; *In Re: Seeburg Corp.*, 2 *Collier Bankruptcy Cases*, 2d series, at page 880; *In Re: W. F. Hurley, Inc.*, 553 F.2d 1096 (8 Cir., 1977)—Legislative History to 11 U.S.C. §105 and 11 U.S.C. §362(b)(4). It has also been held under the Bankruptcy Reform Act of 1978 that a bankruptcy court, as an adjunct of the district court, has been granted pervasive jurisdiction over the debtor and all of its property, including property in dispute—*Matter of Aurora Cord & Cable Co., Inc.*, 1 *Collier Bankruptcy Cases*, 2d series, at page 486. In that case, the Bankruptcy Court determined that it had jurisdiction to resolve adverse claims to property where the Internal Revenue Service had levied on funds belonging to the debtor in order to secure payment of a disputed tax liability. The Court held that the dispute over the property was one "related to" the debtor's Chapter 11 proceedings and thus one of the grounds of jurisdiction under 28 U.S.C. §1471(b) was established. A bona fide dispute over an interest in property of the estate is one of the grounds for a sale of property free and clear of liens under 11 U.S.C. §363(f)(4). Thus, a bankruptcy court clearly has jurisdiction to hear and determine disputes over not just ownership claims but other interests as well in property of the estate—*Circus Time, Inc.* v. *Oxford Bank & Trust*, et. al., 2 *Collier Bankruptcy Cases*, 2d series, at page 282; and *In the matter of Farmers*

Grain Exchange, Inc., 1 BCD 1621 (1975)—*In Re: Bowling Green Mill & Co., Inc.*, 132 F.2d 279 (6th Cir., 1942).

It has been held, however, that a bankruptcy court should not exercise jurisdiction over a controversy involving one creditor, who has possession of the debtor's property and a valid security interest in it, and another creditor claiming an interest in that property under state law when the trustee or debtor makes no claim to the property—*In Re: Lunsford*, 4 *Collier Bankruptcy Cases*, 2d series, at page 1200. In that case, the Bankruptcy Court discussed at length the jurisdictional grant to bankruptcy courts under 28 U.S.C. §1471 and concluded:

> "It is clear that such jurisdiction extends always to the property rights or interests of the Debtor; thus, the Bankruptcy Court has exclusive jurisdiction of all of the property wherever located of the Debtor as of the commencement of the case. Section 1471(e) of Title 28."

In that particular case, the property of the estate was reduced to cash from the sale of the debtor's crops prepetition and was in the hands of the Farmers Home Administration prior to the filing of the petition. Also, the Farmers Home Administration appeared to have a security interest in the property which was not claimed by the Trustee. The Bankruptcy Court in the *Lunsford* case, however, stated:

> "If Trustee were to undertake recovery of this property on some specified grounds of the Bankruptcy Code, it is clear that it would involve property claimed by this estate which would confer jurisdiction upon the Court."

In the instant case, not only is the "property" in question (the Missouri grain sale proceeds) in the possession of Trustee, but the property is being claimed by Trustee to satisfy his debtors' ownership rights to a sub-

stantial amount of the grain, Article 7 UCC storage liens on the Missouri grain for accrued but unpaid pre and post-petition storage charges, and his claims that the Missouri grain should bear its proper part of "the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit of the holder of such claim" as authorized under 11 U.S.C. §506(c). Therefore, Trustee's bona fide claims to the Missouri grain aggregating in excess of $1.5 million do, as a matter of law, confer subject matter jurisdiction upon the Bankruptcy Court under 28 U.S.C. §1471, 28 U.S.C. §1481, 11 U.S.C. §541, 11 U.S.C. §363, and 11 U.S.C. §105. Petitioners' arguments concerning "phantom ownership" and "preliminary jurisdiction" are without merit as the Trustee's claims to the Missouri grain are far broader and more substantial than mere minute ownership rights.

The Brief of the United States in Opposition filed in December, 1981, contains an excellent discussion of some of the more recent cases construing 11 U.S.C. §362(b)(4) and 28 U.S.C. §1471. Trustee and Respondents/Intervenors ("Arkansas Farmers") are in general agreement with the position taken by the United States in its analysis of three (3) recent United States Courts of Appeals decisions construing the scope of 11 U.S.C. §362(b)(4). Trustee and Respondents/Intervenors are in full agreement with the United States that these decisions are consistent with each other on the facts of each case and are not in conflict. Therefore, there is no compelling reason for this Court to review at this time the so-called "police and regulatory power" exception to 11 U.S.C. §362(a) as codified in 11 U.S.C. §362(b)(4).

Trustee and Respondents/Intervenors, however, would like to bring to the attention of this Court several recent Bankruptcy Court decisions interpreting 11 U.S.C.

§362(b)(4) not cited in the brief of the United States. In the *Matter of Alessi*, 4 *Collier Bankruptcy Cases*, 2d series, at page 1003, an Illinois Bankruptcy Court held that the action of a state regulatory board should be upheld in its hearing and decision not to grant a debtor a permanent racing license as long as it was enforcing its "police power" solely and was not acting in a manner designed to affect the debtor-creditor relationship. The Bankruptcy Court held the latter would be barred by the supremacy clause of the U. S. Constitution because federal legislation exists covering debtors under the bankruptcy clause. In the instant case, however, Petitioners seek to affect the debtor-creditor relationship by assuming dominion and control over the Missouri grain sale proceeds and the property of the estates of the debtors and making a liquidating distribution of the same in five (5) separate states court proceedings separate and apart from the dominion and control of Trustee and the Arkansas Bankruptcy Court. It is absurd for Petitioners to contend their contemplated action does not amount to an "insolvency proceeding" or liquidation of the debtors' property. Under §411.519(6) of the Missouri Grain Warehouse Law, "insolvency" of the warehouseman is one of the grounds for appointment of a receiver to operate or liquidate the business of the warehouseman. The August 12, 1980, receivership orders authorized the seizure and liquidation of not only the grain but other of the debtors' property. Not only are Petitioners seeking to protect the Missouri grain claimants' pecuniary interests in the grain, but they are also seeking with no regard to priorities of distribution contained in the U. S. Bankruptcy Code to distribute the Missouri grain sale proceeds without the Trustee and Bankruptcy Court first determining the nature and kind of claims, objections to claims, possible counterclaims, preference actions, and other necessary functions of bankruptcy courts under the

Bankruptcy Reform Act of 1978 and prior law. The most severe kind of prejudice will result to Trustee and the creditors if he has to litigate the adverse conflicting claims of several hundred grain claimants in five (5) separate Missouri state court proceedings without the benefit of the substantive and procedural provisions and safeguards of the U. S. Bankruptcy Code. Not only will administrative expenses be increased, but further delays are inevitable. Trustee submits that such state action is barred under the supremacy clause of the United States Constitution and the above provisions of the U. S. Bankruptcy Code.

A similar distinction was made by a Texas Bankruptcy Court in the case of *In Re: Dan Hixson Chevrolet Company,* 4 *Collier Bankruptcy Cases,* 2d series, at page 1237. There the Bankruptcy Court held that proceedings before the State Motor Vehicle Commission were subject to the automatic stay and that the exception granted for police and regulatory actions under 11 U.S.C. §362(b)(4) was not applicable. The Commission would not have been enforcing its regulatory powers, but instead was deciding the rights of private parties which should occur in a judicial forum. The Court in that case, significantly, distinguished the Fifth Circuit's holding in the case of *In Re: National Labor Relations Board* v. *Evans Plumbing Company,* 639 Fed. 2d 291, cited by Petitioners in one of their Supplemental Briefs.

Another case of significance in construing the limitations on 11 U.S.C. §362(b)(4) is the case of *In Re: Sandmar Corporation,* 4 *Collier Bankruptcy Cases,* 2d series, at page 1263. In that well reasoned decision, a New Mexico Bankruptcy Court concluded that the United States Bankruptcy Court and not a tribal court of an Indian tribe was the only forum for resolution of disputes over property rights between an Indian tribe and a non-Indian debtor

since the dispute must be decided under a comprehensive and uniform federal law (Bankruptcy Reform Act of 1978). The Bankruptcy Court further held that the eviction of a debtor in default under a lease agreement was not the proper exercise of the tribe's "police or regulatory power".

A petition for writ of prohibition against a bankruptcy court and the bankruptcy judge of that court is not appropriate under 28 U.S.C. §1651 where ownership of the grain and other legal and equitable interests in the grain present factual issues and where Petitioners had available other adequate remedies by appeal, intervention, and requests for abstention. One of the leading cases decided by this Court as to whether a petition for writ of prohibition was appropriate and should have been granted by an inferior appellate court is *In Re: Chicago, Rock Island & Pacific Railway Company, Petitioner*, 255 U.S. 373, 41 S.Ct. 288, 65 L.Ed. 631 (1921). In that case, this Court pronounce the following guidelines for issuance of writs of prohibition:

> "There is a well-settled rule by which this Court is guided upon applications for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who, at the outset, objected to the jurisdiction, has preserved his rights by appropriate procedure, and has no other remedy. *Re: Rice*, 155 U.S. 396, 30 L. Ed. 198, 15 Sup. Ct. Rep. 149. If, however, the jurisdiction of a lower court is doubtful (*Re: Muir*, decided by this court January 17, 1921 [254 U.S. 622, Ante 383, 41 Sup. Ct. Rep. 185]), or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record (*Re: Cooper*, 143 U.S. 472, 506, 509, 36 L. Ed. 232, 243, 244, 12 Sup. Ct. Rep. 453), or if the complaining party has an adequate remedy by appeal

> or otherwise (*Re: Tiffany*, 252 U.S. 32, 37, 64 L. Ed. 443, 445, 40 Sup. Ct. Rep. 239; *Ex Parte Harding*, 219 U.S. 363, 55 L. Ed. 252, 35 L.R.A. (N.S.) 392, 31 Sup. Ct. Rep. 324), the writ will ordinarily be denied."

See also *United States v. Boe*, 453 Fed. 2d 151; *In Re: Nichols*, 114 Fed. 2d 364 (5th Cir., 1940), where that Court held that a writ of prohibition would not lie where petitioners rights were protected by appeal taken in a bankruptcy proceeding; and *Leimer v. Reeves*, 184 Fed. 2d 441 (8th Cir., 1950), where that Court held that prohibition is primarily a restraining rather than a corrective remedy and will not lie for grievances or errors which may be redressed or corrected in the ordinary course of judicial proceedings by other remedies provided by law. See also *Barker v. United States District Court*, et al., 185 Fed. 2d 582 (9th Cir., 1950), where the Ninth Circuit Court of Appeals held that prohibition against a judge is a drastic and extraordinary remedy reserved for realy extraordinary causes and circumstances. Although the facts and circumstances of the instant case may be somewhat unusual, they certainly were made extraordinary and even inflammatory by actions of Petitioners in resisting the jurisdiction of Respondents over the Missouri grain and over operations of debtors' Missouri elevators. Petitioners have always had the right of appeal; intervention; and request for abstention, either as to a certain aspect of the case (the Missouri grain) under 11 U.S.C. §1471(d) or the entire proceedings affecting the Missouri operations of the debtor entities under 11 U.S.C. §305(a). For whatever reason, Petitioners did not elect to choose less drastic remedies and now cannot complain of the denial by the Eighth Circuit Court of Appeals of their request for issuance of an extraordinary writ.

Even should this Court determine that the contemplated actions of Petitioners were not automatically stayed under 11 U.S.C. §362(a) as being a proceeding by a govern-

mental unit to enforce such governmental unit's police or regulatory power under 11 U.S.C. §362(b)(4), nevertheless Respondent, Bankruptcy Court, has the unquestioned power and authority under 11 U.S.C. §105 to issue a separate independent injunction against Petitioners to enjoin their interference with property of the debtors' estates. Having shown that Trustee on behalf of debtor entities has substantial claims of various types to the Missouri grain sale proceeds aggregated in excess of $1.5 million, Respondent, Bankruptcy Court, may issue an injunction to protect its own jurisdiction under 11 U.S.C. §105, 28 U.S.C. §1651, and 28 U.S.C. §1481. This is abundantly clear under the Legislative History to 11 U.S.C. §362(b), the pertinent part of which is as follows:

> "Subsection (b) lists five exceptions to the automatic stay. The effect of an exception is not to make the action immune from injunction.
>
> The court has ample other powers to stay actions not covered by the automatic stay. Section 105, of proposed title 11, derived from Bankruptcy Act section 2a(15), grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The bankruptcy courts are brought within the scope of the All Writs Statute, 28 U.S.C. §1651 (1970), and are given the powers of a court of law, equity, and admiralty (H.R. 8200, §243(a), proposed 28 U.S.C. §1481). Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis

whether a particular action which may be harming the estate should be stayed."

Injunctions by bankruptcy courts to protect their own jurisdiction and to prevent interference by governmental entities with their proceedings and to protect property of the trustee and debtors' estates are fairly common. *In Re: Shippers Interstate Service, Inc.*, 618 Fed. 2d 13; *In Re: Bel Air Chateau Hospital, Inc.*, 611 Fed. 2d 1251; *In Re: W. F. Hurley, Inc.*, 553 Fed. 2d 1096; *In Re: Saugus General Hospital, Inc.*, 19 *Collier Bankruptcy Cases* 651; *Stout* v. *Green*, 131 Fed. 2d 995; *Duggan* v. *Sansberry*, 327 U. S. 499 (1946); *Schatzman, Trustee* v. *Department of Health, et al.*, 2 *Collier Bankruptcy Cases*, 2d series, 639; and, *The Seeburg Corp.* v. *NLRB*, 2 *Collier Bankruptcy Cases*, 2d series, 880.

Trustee, his counsel, and his certified public accountants have spent the last year in negotiating, drafting, preparing, and finalizing Trustee's Joint Plan of Reorganization for his Chapter 11 debtors and Disclosure Statement. Trustee, his counsel, and his certified public accountants have also spent countless hours analyzing and investigating approximately 600 claims filed against Trustee's debtor entities. These important pleadings will be filed by Trustee shortly so that all complex claims and disputes over the Arkansas and Missouri grain sale proceeds may be resolved fairly and expeditiously without further costly delay and litigation. The return to grain claimants, especially in Missouri, will be substantial. At this advanced stage of these Chapter 11 cases with a final settlement and resolution of all disputes over the grain sale proceeds at hand, it would be inequitable and unjust for this Court to delay further distribution to the grain claimants and other creditors of the debtors' estates by issuing a writ of certiorari. Indeed, it is difficult to conceive of the kind of relief this Court could fashion to benefit petitioners. Petitioners long

ago conceded that Respondent, Bankruptcy Court, had jurisdiction over the Missouri grain by conceding that Trustee owned at least 2.3% of the grain. Trustee has previously demonstrated to this Court that Trustee's interest in the fungible commingled Missouri grain is far greater when his debtors' additional ownership claims are evaluated, storage claims are taken into consideration, and reimbursement for costs of preserving and protecting the grain are analyzed. Based on these undisputed facts, this Court cannot determine that Respondent, Bankruptcy Court, has no jurisdiction over the Missouri grain or its sale proceeds. At the most, this Court could only return the case to Respondent Bankruptcy Court for further factual determinations with respect to jurisdictional issues. It is clear, based on the present facts, that these jurisdictional issues will be decided adversely to Petitioners. And, of course, any such decision making process will result in further expense and delay to the prejudice of the creditors of the debtors' estates. It is also interesting to note that no claimant to the Missouri grain sale proceeds has sought to intervene in support of Petitioners Petition for a Writ of Certiorari. The parties with the most to lose economically have absolutely no interest in this Court issuing a writ of certiorari to review the jurisdictional decision of the Eighth Circuit Court of Appeals.

Finally, Petitioners' remedy is not the issuance of a writ of certiorari from this Court but remedial legislation from the Congress of the United States. Petitioners and others have been active for several months in seeking to have the Bankruptcy Reform Act of 1978 as well as Title VII, Chapter 10 of the United States Code, dealing with agricultural warehouse licensing and operations, amended. The thrust of this proposed legislation is to require bankruptcy courts to expedite the determination of grain ownership and other liens on the grain in the event of a bank-

ruptcy proceeding for a public grain warehouse. The proposed legislation would set time limits on the bankruptcy courts' determination of interests in the grain and would also establish an elaborate system for distributing the proceeds and assessing costs, expenses, and the like against the grain or its sale proceeds. Although substantial opposition apparently developed to the proposed legislation, it is Trustee's information that the Senate of the United States has already passed the proposed legislation and that similar legislation is now pending in the House of Representatives Judicial Committee awaiting further action. This legislation, should it become law, although technically ill-advised in certain areas, will solve many of the federal-state conflicts with respect to jurisdiction over grain situated in bankrupt elevators. This will, of course, not resolve the jurisdictional issues in the instant case, but will apparently alleviate some of these problems in similar future cases. In any event, the Congress of the United States is better equipped than this Court to solve these problems which affect not just Petitioners and other states similarly situated, but farmers, banking institutions, the Commodity Credit Corporation, the Farmers Home Administration, federally chartered production credit associations, and other lending institutions. Contemplated action in this area by Congress is still another reason why Petitioners' Petition for Writ of Certiorari should be denied.

In conclusion, the very essence of the exception to the automatic stay provisions of 11 U.S.C. §362(a) as codified in 11 U.S.C. §362(b)(4) is a valid and proper exercise by a governmental unit of its police and regulatory powers. Such governmental regulation must be confined to the public health, safety, and welfare or else such purported actions will be automatically stayed. This is especially true when governmental action disguised as "regulation" affects the pecuniary interest in property of the debtor

and/or seeks to liquidate the debtor's property with a distribution to creditors in violation of the supremacy clause of the U.S. Constitution and the substantive provisions of the U.S. Bankruptcy Code. This is the goal of petitioners in the instant case and such is clearly prohibited under existing law. The intended purpose of the governmental action must be carefully analyzed and given a narrow constitution—*Florida State University Law Review* at page 369 and *Schatzman* v. *Department of Health and Rehabilitative Services*, 4 B.R. 704 (S.D. Fla., 1980).

Respondent/Trustee and Respondents/Intervenors ("Arkansas Farmers") contend the Petition for Writ of Certiorari should be denied.

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No. 81-79

In the Supreme Court of the United States

OCTOBER TERM, 1981

MISSOURI, ET AL., PETITIONERS

v.

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether proceedings in federal court under the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 101 *et seq.*, preempt state court liquidation or insolvency proceedings under the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 *et. seq.* (1979 & Cum. Supp. 1981).

2. Whether the bankruptcy court has the power, under 11 U.S.C. (Supp. IV) 105(a), to enjoin state liquidation proceedings, even assuming such proceedings are within the exception to the automatic stay provision of the Bankruptcy Code for actions by "a governmental unit to enforce such governmental unit's police or regulatory power" (11 U.S.C. (Supp. IV) 362(b)(4)).

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In the Supreme Court of the United States

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UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-21) is reported at 647 F.2d 768. The opinion of the district court (Pet. App. A-23 to A-40) is reported at 7 Bankr. Rep. 974.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1981. On July 1, 1981, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July 13, 1981. The peti-

tion was filed on July 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 4 of the United States Constitution provides:

> The Congress shall have Power * * * [t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States * * *.

2. Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Section 105(a) of the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 105(a), provides:

> The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

4. Section 362 of the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 362, provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or

other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * * * *

(3) any act to obtain possession of property of the estate or of property from the estate;

* * * * *

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

* * * * *

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; * * *.

5. 28 U.S.C. (Supp. III) 1471(e) provides:

The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

6. Mo. Rev. Stat. § 411.519.6 (1979) provides:

If at any time, the director, whether or not he or his authorized agent has possession as authorized by this section, has evidence that a warehouseman is insolvent or is unable to satisfy the claims of all depositors, the director may petition the circuit court for the appointment of a receiver to operate or liquidate the business of the warehouseman in accordance with law.

STATEMENT

Robert James, Don James, G. E. James and James Agri-Center, Inc., a corporation affiliated with the foregoing individuals (the debtors), operated public grain elevators in Arkansas and Missouri (Pet. App. A-3). The value of the grain contained in their Missouri elevators alone was estimated at $5,000,000. The State of Missouri concedes that the debtors owned at least 2.3% of that grain, a property interest of approximately $115,000 (Pet. App. A-6). On August 11, 1980, the debtors filed proceedings pursuant to the Bankruptcy Reform Act of 1978 (the Bankruptcy Code), 11 U.S.C. (Supp. IV) 101 *et seq.*, in the bankruptcy court for the Eastern District of Arkansas.[1]

The next day, the State of Missouri obtained orders from the state circuit courts for the counties in which the debtors' Missouri grain elevators were located appointing the Director of the Missouri Department of Agriculture receiver of the debtors' Missouri grain elevators under § 411.519.6, the insolvency provision of the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 *et seq.* (1979 & Cum. Supp. 1981). The state court orders authorized the Director of the Missouri Department of Agriculture, as receiver, to " 'carry out such operation or liquidation of said public grain warehouse[s] in order to protect the best interests of those individuals storing

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[1] The individual debtors initially filed liquidation proceedings under Chapter VII of the Bankruptcy Code, which they subsequently converted to reorganization proceedings under Chapter XI. The corporate debtor at the outset filed for reorganization under Chapter XI (Pet. App. A-3).

grain in said facilit[ies]' " (Pet. App. A-4; Br. Opp. App. A-1 to A-3, A-23 to A-26).[2]

On August 15, 1980, the bankruptcy court appointed respondent Robert P. Lindsey trustee in bankruptcy, and on August 29, 1980, the bankruptcy court ordered Lindsey to assume certain grain purchase contracts that the debtors had entered into prior to bankruptcy. Approximately two weeks later, several farmer depositors, believing that the order deprived them of their rightful possession of their grain, seized and blockaded part of the debtors' Missouri facilities in an attempt to prevent the trustee from carrying out the bankruptcy court's order. On the order of the bankruptcy court, United States marshals interceded and broke the blockade (Pet. App. A-4 to A-5; Br. Opp. App. A-29 to A-31).

On September 23, 1980, the trustee initiated an adversary action in the bankruptcy court and sought leave to sell the grain stored in the debtors' warehouses pursuant to 11 U.S.C. (Supp. IV) 363(f)(4). He alleged that there was a genuine dispute concerning ownership of the grain and that the cost of storage, market conditions, and the risk of deterioration of the grain favored such a sale, the proceeds of which would be distributed after ownership rights in the grain were determined (Pet. App. A-6).

A hearing on the trustee's action was scheduled for October 27, 1980 (Pet. App. A-29). On October

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[2] "Br. Opp." and "Br. Opp. App." refer to the brief in opposition filed in this Court by the trustee and the "Arkansas Farmers" and the appendix attached thereto.

On August 8, 1980, the debtors had authorized the Missouri Department of Agriculture to assume control of the grain in their Missouri warehouses pursuant to Missouri law empowering the State to operate and liquidate insolvent grain warehouses (Pet. App. A-4 & n.6, A-24 to A-25).

20, however, the State filed suit against the trustee and the debtors in state court. The state court, asserting exclusive jurisdiction of the grain located in Missouri pursuant to the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 *et seq.* (1979 & Cum. Supp. 1981), authorized the Director of the Missouri Department of Agriculture to "seize, by physical means, if required" the debtors' Missouri grain warehouses and the grain and records contained in them, and entered an ex parte temporary restraining order enjoining the debtors and the trustee from taking any action respecting the Missouri grain, from prosecuting the pending bankruptcy case, or from seeking to hold the State of Missouri or its Director of Agriculture in contempt of any court (Pet. App. A-7, A-29 to A-30; Br. Opp. App. A-36 to A-43).

On the same day the state order issued, the bankruptcy judge advised counsel for the State that contempt proceedings against its Director of Agriculture would be heard in the bankruptcy court on October 22, 1980 (Pet. App. A-7). In response, the State petitioned the United States Court of Appeals for the Eighth Circuit for a writ of prohibition staying the bankruptcy court proceedings. The court of appeals denied the State's petition on October 21, 1980, without prejudice to the State's filing such a petition in the United States District Court for the Eastern District of Arkansas, but stayed the contempt proceedings and other matters before the bankruptcy court pending further order (*ibid.*).

The State then filed the present action, seeking a writ of prohibition from the district court (Pet. App. A-41 to A-69). That court denied the State's petition for a writ of prohibition (*id.* at A-23 to A-40), holding (*id.* at A-34) that "at the very least, the Bankruptcy Court has jurisdiction to resolve the

competing claims to the property in question by scrutinizing the respective legal and equitable interests and [to] decide whether the debtors' interest is such that it is property of the estate within the meaning of [11 U.S.C. (Supp. IV) 541]." The district court rejected Missouri's contention that its actions came within the exception to the automatic stay provision for actions taken by a governmental unit to enforce its "police or regulatory power" (11 U.S.C. (Supp. IV) 362(b)(4)) on the ground that the State's "sole objective is to protect the pecuniary interests in property of purported depositors" (Pet. App. A-35). Finally, the court held that under the Supremacy Clause, the Bankruptcy Code preempted the insolvency provision of the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.519.6 (1979), because that provision conflicted with the pending bankruptcy proceeding (Pet. App. A-37 to A-38).

The Eighth Circuit denied a second petition for a writ of mandamus addressed to it and affirmed the decision of the district court (Pet. App. A-1 to A-21). At the outset, the court recognized (*id.* at A-10 to A-11) the exclusive jurisdiction of the bankruptcy court over the "property" and "estate" of the debtors under 11 U.S.C. (Supp. IV) 541 and 28 U.S.C. (Supp. III) 1471(e). Although the court noted (Pet. App. A-15) that Missouri's grain laws are "regulatory in nature," it concluded (*ibid.*) that because Missouri's grain laws "govern[] the operation and liquidation of grain warehouses, [they] directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the section 362(b)(4) exception." In the alternative, the court held (Pet. App. A-15) that because "a bank-

ruptcy action preempts state insolvency proceedings" Missouri's "attempted enforcement of its insolvency laws does not oust the bankruptcy court of jurisdiction." Thus, the court continued (*ibid.*; footnote omitted),

> [t]he bankruptcy court could take appropriate steps to protect its jurisdiction over the estate, regardless of whether a proceeding falls within the section 362(b)(4) exception. For example, the court may "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. [(Supp. IV)] § 105(a).

Finally, the court observed (Pet. App. A-20) that "Missouri officials should have presented the issues raised in [this] proceeding to the bankruptcy court in the first instance. If dissatisfied with the result, an appeal could have been taken."

The court vacated the stays of the bankruptcy court proceedings it had entered (Pet. App. A-21), and petitioners did not seek a stay of the court of appeals' decision. Accordingly, on May 27, 1981, the bankruptcy court entered an order authorizing the trustee, after notice to all parties and a hearing, to sell the grain located in the Missouri warehouses (Br. Opp. App. A-58 to A-69).[3] Pursuant to that order, the trustee sold all of the Missouri grain on June 26, 1981 (*id.* at A-90 to A-97; Br. Opp. 16).

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[3] The court of appeals had lifted its stay with respect to the grain located in Arkansas and had permitted the sale of that grain on February 4, 1981 (Br. Opp. App. A-47 to A-55).

ARGUMENT

The discretionary refusal of the courts below to issue a writ of prohibition staying the federal bankruptcy proceedings was proper, and that decision does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. Under the Supremacy Clause and the Bankruptcy Clause of the Constitution, Article VI, Clause 2 and Article I, Section 8, Clause 4, the Bankruptcy Code supersedes any state law or proceeding that would conflict or interfere with proceedings under the Code or with Congress' purposes in enacting that legislation. See *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971); *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 737-738 (1931); *In re Watts & Sachs*, 190 U.S. 1, 27 (1903). Because the bankruptcy court had jurisdiction over the debtors' grain located in Missouri, and because state insolvency proceedings would have interfered with that jurisdiction, the state proceedings were preempted by the federal proceedings and, a fortiori, Missouri's petitions for a writ of prohibition were properly denied.

a. The grain located in Missouri was in the debtors' possession at the time they filed their petitions in bankruptcy. That fact alone rendered the grain subject to the exclusive jurisdiction of the bankruptcy court under 28 U.S.C. (Supp. III) 1471(e). See Historical and Revision Notes to 11 U.S.C. (Supp. IV) 541 ("[t]he debtor's interest in property * * * includes * * * a possessory interest * * *").[4]

[4] Petitioners claim (Supp. Br. 7-8) that the court of appeals erroneously relied on 11 U.S.C. (Supp. IV) 541, which defines the property of the estate, to uphold the bankruptcy court's jurisdiction over the Missouri grain. Petitioners contend that 28 U.S.C. (Supp. III) 1471(e) limits the

Moreover, the State concedes that the debtors owned 2.3% of the grain located in Missouri, the total value of which was estimated at $5,000,000

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jurisdiction of the bankruptcy court to "the property * * * of the debtor," which, according to petitioners, is less than the whole of the property of the estate. Because petitioners did not raise this issue in the court of appeals, they are foreclosed from raising it in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

In any event, the claim is without merit. It is difficult to imagine how the bankruptcy court could function if its jurisdiction did not extend to all of the property of the estate, and the legislative history clearly shows that Congress did not intend an artificial limit of the kind advocated by petitioners. The statement that was read into the Congressional Record in both Houses of Congress in lieu of a conference report (124 Cong. Rec. H11088 (daily ed. Sept. 28, 1978) (remarks of Rep. Rousselot)) explains that

> [t]he bankruptcy court is * * * given pervasive jurisdiction over all proceedings arising in or relating to bankruptcy cases. In addition, the bankruptcy court is given exclusive jurisdiction of the property of the estate in a case under title 11.

124 Cong. Rec. H11107-H11108 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); accord, 124 Cong. Rec. S17425 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

We also note that § 220(e) of S. 863, 97th Cong., 1st Sess. (1981), a bill "[t]o establish a uniform law on the subject of bankruptcies," would eliminate any possible confusion on this subject by adding, at the end of 28 U.S.C. (Supp. III) 1471(e), the phrase "and of all property, wherever located, of the estate in such case." The Senate report accompanying S. 863, S. Rep. No. 97-150, 97th Cong., 1st Sess. 21 (1981), states that § 220(e) merely "corrects a typographical error," making clear that the amendment was not intended to alter existing law.

Finally, contrary to petitioners' suggestion (Supp. Br. 7), the distinction drawn by this Court in *Reading Co.* v.

(Pet. App. A-6). In addition, "[o]ther parties claiming ownership of the grain include Missouri and Arkansas farmer-producers, the Commodity Credit Corporation, and the First Tennessee Bank, N.A., Memphis" (*ibid.*). Because only the bankruptcy court was authorized by Congress to determine these competing claims, the court of appeals correctly held that the State of Missouri could not interfere with the orderly administration of the debtors' petitions in the bankruptcy court.

b. Contrary to petitioners' bare assertions (Reply Br. 2-3), the action initiated by Missouri in state court under the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 *et seq.* (1979 & Cum. Supp. 1981), was in the nature of an insolvency or liquidation proceeding. The State's initial pleading alleged the insolvency of the debtors and sought the appointment of the Director of the Department of Agriculture of Missouri as receiver "to take possession of the public grain warehouse to operate or liquidate the warehouse in accordance with laws as may be appropriate" (Br. Opp. App. A-2). Similarly, the state court orders granting Missouri's requests for appointment of a receiver (Br. Opp. App. A-23 to A-26) did so pursuant to Mo. Rev. Stat. § 411.519.6 (1979), the insolvency provision of Missouri's Grain Warehouse Law (see page 3, *supra*). Those orders required the receiver to "make an audit and full investigation of the financial circumstances of [the debtors] and carry out such operation or liquidation of said public grain warehouse in order to protect the best interests of

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Brown, 391 U.S. 470 (1968), was between a pre-petition debt of the bankrupt and a post-petition debt incurred by the estate (*id.* at 482). Moreover, in that case the Court was construing the predecessor statute to the Bankruptcy Reform Act of 1978, which controls the present case.

those individuals storing grain in said facility" (Br. Opp. App. A-23). Moreover, although petitioners assert (Reply Br. 3) that the nature of the proceedings filed by them in state court underwent a change between their August 1980 petitions for appointment of a receiver and their October 1980 petition for immediate possession and an injunction, the order to show cause, temporary restraining order and seizure order that petitioners obtained in state court on October 20, 1980, were based in large part on the orders of receivership entered pursuant to Mo. Rev. Stat. § 411.519.6 (1979) (Br. Opp. App. A-37 to A-38, A-40 to A-42).

2. Because, as we have shown above (pages 9-11, *supra*), the federal court proceedings under the Bankruptcy Code preempt the state court proceedings, this case does not present an appropriate vehicle in which to test the limits of the exception to the automatic stay provision for actions by "a governmental unit to enforce such governmental unit's police or regulatory power" (11 U.S.C. (Supp. IV) 362(b)(4)).[5] Even assuming, however, that Mis-

[5] Indeed, the court of appeals appears to have based its holding that Missouri's action did not come within the exception in 11 U.S.C. (Supp. IV) 362(b)(4) on preemption grounds, stating (Pet. App. A-15; emphasis added) that "Missouri's laws, by governing the operation and liquidation of grain warehouses, directly conflict with the control of the property by the bankruptcy court and, *therefore*, do not fall within the section 362(b)(4) exception." It was in the same context that the court below stated (Pet. App. A-15) that Section 362(b)(4) did not extend to Missouri's grain laws because they "primarily relate to the protection of the pecuniary interest in the debtors' property and not to matters of public safety and health." In our view, protection of some private, pecuniary interest is involved in many governmental actions, and that fact alone does not exclude those actions from Section 362(b)(4). As the court of appeals recognized (Pet. App. A-14 to A-16), however, Section

souri's actions are within Section 362(b)(4)'s exception to the *automatic* stay provision, as the court of appeals correctly observed (Pet. App. A-16; foot-

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362(b)(4) cannot accommodate actions by governmental units that would conflict with the provisions or the purposes of the Bankruptcy Code.

In any event, the cases on which petitioners rely (Supp. Br. 3-4 & n.**) do not evidence a conflict among the circuits concerning the scope of Section 362(b)(4). In *CFTC* v. *Incomco, Inc.*, 649 F.2d 128 (2d Cir. 1981), the court of appeals agreed with the Commodity Futures Trading Commission (CFTC) that its actions to obtain access to the books and records relating to the defendants' commodity futures trading business and to obtain appointment of an equitable receiver came within 11 U.S.C. (Supp. IV) 362(b)(4)'s exception to the automatic stay provision. There is nothing in that decision, however, that suggests that the CFTC's actions would have interfered with the voluntary bankruptcy proceedings filed after the Commission had instituted its actions. To the contrary, the district court had entered the requested injunction relating to the inspection of the defendants' books and records " '*in aid* of the Bankruptcy Court' " (649 F.2d at 131; emphasis added).

Nor does the decision in this case conflict with *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981). There, the Fifth Circuit held that the filing of a bankruptcy petition did not bar the NLRB from exercising its jurisdiction over unfair labor practice charges and that the court could enter an enforcement order for injunctive relief and back pay. The court of appeals expressly pointed out (*id.* at 293 & n.3), however, that it was not deciding "whether an action to execute or enforce a money judgment would be exempt from the automatic stay" or "whether the bankruptcy court has power under [11 U.S.C. (Supp. IV) 105(a)] to issue a discretionary stay notwithstanding the exemption of the Board's action from the automatic stay." Similarly, in *SEC* v. *First Financial Group of Texas*, 645 F.2d 429 (1981), the Fifth Circuit held that Section 362(b)(4) permitted the SEC to obtain appointment of a temporary receiver in proceedings ancillary to civil enforcement proceedings in order to "prevent dismemberment of the corporate estate by management personnel who have been found to have acted fraudu-

note omitted; emphasis added), "the bankruptcy court possesses power *in its discretion* to enjoin state courts, officials, and agencies from interfering with assets in [the] custody of the bankruptcy court." That discretionary power arises out of 11 U.S.C. (Supp. IV) 105(a), which authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." As the legislative history makes explicit, 11 U.S.C. (Supp. IV) 105(a)'s broad grant of discretionary power includes "authorization * * * for a court of the United States to stay the action of a state court." S. Rep. No. 95-989, 95th Cong., 2d Sess. 29 (1978). See also *SEC* v. *First Financial Group of Texas*, 645 F.2d 429, 440 (5th Cir. 1981).

3. In sum, the court of appeals did not abuse its discretion by refusing to issue the extraordinary writ of prohibition. Writs of prohibition and mandamus "are drastic and extraordinary remedies" to be "reserved for really extraordinary causes," in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259, 260 (1947). The power to issue such writs "is discretionary and it is sparingly exercised." *Parr* v. *United States*, 351 U.S. 513, 520 (1956). Hence, a writ of prohibition is available only when an inferior court has wholly exceeded its jurisdiction. See *Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943); *Ex parte Christy*, 44 U.S. (3 How.) 292, 322 (1845); cf. *Kerr* v. *United States*

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lently and who could otherwise easily dispose of the assets to the detriment of the debtor's creditors" (645 F.2d at 439). The court noted (*id.* at 440), however, that if the ancillary proceedings actually "threaten[ed] the assets of the debtor's estate" the bankruptcy court could stay them under 11 U.S.C. (Supp. IV) 105(a) or require the debtor's assets to be turned over to the trustee under 11 U.S.C. (Supp. IV) 543.

District Court, 426 U.S. 394, 402 (1976) (writ of mandamus); *Will* v. *United States*, 389 U.S. 90, 95 (1967) (same). See also R. Stern & E. Gressman, *Supreme Court Practice* 634-639 (5th ed. 1978). Because, as we have shown above (pages 9-14, *supra*), the bankruptcy court had jurisdiction of the Missouri grain, the courts below acted well within their discretion in denying the petitions for a writ of prohibition.

We further note that petitioners failed to raise any of the jurisdictional arguments presented in the petition for a writ of certiorari in the bankruptcy court, which plainly had jurisdiction to rule on the scope of its own jurisdiction. See, *e.g.*, *United States* v. *United Mine Workers of America*, 330 U.S. 258, 290-293 (1947). Nor did petitioners attempt to avail themselves of the Bankruptcy Code's provisions for appeal from an adverse order of the bankruptcy court to a three bankruptcy judge panel, the district court or the court of appeals. See Section 405(c)(1) of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2685. In these circumstances, issuance of a writ of prohibition would have been clearly inappropriate. See, *e.g.*, *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86 (1970); *Ex parte Republic of Peru*, *supra*, 318 U.S. at 584.[6]

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[6] Petitioners recently filed a Second Supplemental Brief in support of their petition, but the cases cited therein do not advance their contentions. The court in *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981), simply held that the Ohio workers' compensation scheme came within the exception to the automatic stay as a lawful exercise of the state's police power to adjudicate such claims, noting (*id.* at 1113) that any employees' claims would be paid from the state insurance fund or bonds posted by the employer, so that the debtor's bankruptcy estate would be wholly unaffected.

Gorenz v. *Illinois Department of Agriculture*, 653 F.2d 1179 (7th Cir. 1981), was a bankruptcy case involving

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1981

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warehoused grain, but there the similarity to this case ends. Illinois had seized grain from a warehouseman prior to bankruptcy, liquidated it, and retained the proceeds, presumably for distribution to farmers who had deposited their grain with the warehouseman. The trustee filed a complaint in the bankruptcy proceeding for an accounting and obtained a turnover order for the grain proceeds held by Illinois. The Seventh Circuit reversed the turnover order and remanded for further proceedings to allow the trustee to make a showing "that the property or proceeds in question [were] a part of the bankrupt's estate." *Id.* at 1184. In *Gorenz*, "the bankruptcy court did not have actual or constructive possession of the grain proceeds" (*id.* at 1182) and the state denied that the debtor had *any* ownership interest in them (*id.* at 1183).

The facts in the instant case present a stark contrast. Here, the grain was in the possession of the debtor at the time the bankruptcy petition was filed and the State of Missouri *conceded* that the debtor had an ownership interest in the grain of at least 2.3%. Further, the question of ownership in *Gorenz* was being tested in the appropriate forum—the bankruptcy court. In this case, the State of Missouri seeks to resolve this issue by inappropriate means—through extraordinary writs of prohibition and state insolvency proceedings. Finally, *Gorenz* was decided under the prior bankruptcy Act (653 F.2d at 1180 n.1).

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No. 81-79

IN THE

Supreme Court of the United States

October Term, 1981

IN RE STATE OF MISSOURI, et al.,

Petitioners,

—v.—

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS and the HONORABLE CHARLES W. BAKER, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS and the HONORABLE CHARLES W. BAKER, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief replies to respondents' new contentions. They argue that the issue of a bankruptcy court's jurisdiction to bar a state from enforcing its grain laws in its own courts because of the bankruptcy of a warehouseman was rendered "moot" by respondents' issuance of recent orders for the sale of the grain. Petitioners contend that this issue was necessarily kept alive by the provision of respondents' own orders of sale that expressly transferred all grain ownership claims from the grain to the proceeds of its sale. Res. Br., pp. 5, 13, A-76, A-84.* No contrary authority has been cited by respondents.

Respondents next urge that certiorari should be denied because petitioners did not seek relief in the bankruptcy court

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* References beginning with the prefix "Res. Br." are to respondents' brief in opposition including its appendices. References to "Pet." are to petitioners' petition for a writ of certiorari and its appendices. Petitioners' supplemental brief is referred to as "Supp. Br."

after losing in the Eighth Circuit. Res. Br., pp. 8-11, 16. This "exhaustion of remedies" theory does not apply where the inferior tribunal lacks subject matter jurisdiction. Nor do respondents cite any supporting authority.

Finally, based on the lower court's incorrect premise that the Missouri grain laws are "insolvency" and liquidation laws, Pet., p. A-15, and that as such they conflict with the federal bankruptcy laws, respondents contend that the bankruptcy court's jurisdiction is supreme and bars state court proceedings to enforce grain laws. They also contend that the bankruptcy court had jurisdiction over this grain because of its jurisdiction over the property of the debtors. Res. Br., pp. 18-21. Those contentions, advanced in opposition to a grant of certiorari, also lack merit.

The Eighth Circuit found that only a "minute" portion of the grain was property of these estates, Pet., p. A-11; virtually all of the grain (97.7%) was owned by third parties. Any controversies did not involve the debtors or their property but concerned competing ownership and lien claims of third parties. The bankruptcy courts have no jurisdiction over those disputes. The 1978 bankruptcy legislation preserved the historic power of governments to enforce police or regulatory enactments, such as grain laws, Pet., p. 16, in non-bankruptcy courts.

The Missouri grain law is not an "insolvency" law

Respondents urge that federal bankruptcy laws supersede state receivership proceedings. Res. Br., pp. 18-20. They contend that the Missouri grain law is an "insolvency" law providing for liquidation of warehousemen, and that as such it was preempted by the federal bankruptcy laws. Res. Br., pp. 18-19. The lower court so ruled. Pet., p. A-15. Those conclusions are based on a misunderstanding of the grain law and its section dealing with enforcement. § 411.519 RSMo1978, at Pet., pp. 4-6. Two different types of enforcement proceedings are authorized by § 411.519. One provides for the state's *seizure* of the grain. §§ 411.519.1(4) and 411.519.2. The second authorizes the state court's appointment of a receiver to "operate or liquidate" if a warehouseman is insolvent or

unable to satisfy the claims of all depositors. § 411.519.6. Petitioners' action filed on October 20, 1980 was for seizure (unlike their August 1980 receivership proceedings).

Section 411.519 RSMo1978 deals with "Insufficient inventory", as stated by its caption. Pet., p. 4. Respondents acknowledge that there were "substantial shortages of grain in [the debtors' Missouri warehouse] elevators". Res. Br., p. 2. Petitioners' actions pursuant to § 411.519 were taken in the public interest to deal with grain shortages. Liquidation of the warehousemen's own assets (i.e., plant and equipment) was not their object. Explicit distinction is drawn by the Missouri grain statute between a "*seizure or receivership* action filed under this section". § 411.519.7. (Italics added). Seizure is authorized without regard to solvency or insolvency. However, seizure and receivership are both statutory remedies to deal with inventory shortages. Neither is for liquidation of a warehouseman's own property. Insolvency of the warehouseman may be only coincidentally involved because inventory shortages and insolvency usually coincide. The Missouri grain law therefore, provides means to protect the ownership of grain in the event of shortage; it is not an insolvency law to liquidate insolvent warehousemen's own assets. *Perez* v. *Campbell*, 402 U.S. 637 (1971), a classic preemption case, does not apply in these circumstances as observed in *In re Grand Spaulding Dodge, Inc.*, 5 B.R. 481, 486 (N.D. Ill. 1980).

The issues are not "moot" despite the grain sale

The issues in this case are alive. The bankruptcy court's own memorandum directing the grain sales recognized that applicable state law could compel those claiming the ownership of grain deposited with a warehouseman "to take a money satisfaction" in lieu of their ownership interests. Res. Br., p. A-76. The proceeds of the grain sales thus stand in the place, and are the equivalent, of the grain itself. In the event of a reversal, petitioners' state court enforcement proceedings thus would become the forum of dispute resolution with respect to the proceeds of sale, the monetary equivalent of the previously stored grain; ownership and distribution would be determined pursuant to Missouri law. Cf., *Butner* v. *United States*, 440 U.S. 48 (1979). Any doubt is laid to rest by the provision of

respondents' order of sale that "all ownership claims [shall] attach to the net sale proceeds". Res. Br., p. A-84. This explicit provision independently establishes state court jurisdiction over the proceeds.

It can also be expected that substantial charges for administrative services would be made in the bankruptcy proceedings against the proceeds of the grain sales, Res. Br., pp. A-77-78, that could exceed several million dollars, Pet., p. A-50. A reversal would save those substantial sums for the grain owners. On that basis alone the case is not moot.

There is a basic conflict between a bankruptcy court's paramount interest to protect *creditors'* rights and that of state tribunals and authorities to protect *property owners'* interests; respondents' confused notion that the grain *owners* are "creditor claimants", Res. Br., pp. A-75-76, underscores the difference in their orientation. Respondents' out of focus view of mootness led to their contention that a reversal would accomplish nothing for "any creditor" because the bankruptcy trustee "is already doing what petitioners seek to do". Res. Br., p. 17. Their contention fails to recognize the distinction between owners and creditors.

The serious conflict in federal-state relations in this case is a reason for deciding the issues on the merits despite the sale of the grain. This Court has entertained cases on their merits because of such a conflict and its impact on bankruptcy administration. *Callaway* v. *Benton*, 336 U.S. 132, 136 (1949).

Considerations of federalism call for a high threshold test to determine mootness. "The seriousness of federal judicial interference with state civil functions has long been recognized by this Court". *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 603-04, *reh. denied*, 421 U.S. 971 (1975). This Court has also indicated that "the rightful independence of state governments" requires that federal courts "scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined". *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 212 (1971), *reh. denied*, 404 U.S. 1064 (1972). See also, *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

The claim of mootness is particularly lacking in merit when tested against petitioners' governmental interest that can be

vindicated for the public good only by a reversal of the erroneous decision below. Petitioners have an overriding governmental interest to ensure the reliability and integrity of the comprehensive Missouri grain warehouse regulation system, so that grain depositors and purchasers may rely both on warehouse laws and warehouse receipts, without being subjected to "highly questionable claims" [*Matter of Cartridge Television, Inc.*, 535 F.2d 1388, 1391 (2d Cir. 1976)] made in protracted and costly litigation in the bankruptcy courts. Cf., *Nicholas* v. *United States*, 384 U.S. 678, 682 (1966).

Indicia of a live controversy

The presence of any one of the following criteria has been held to preclude a finding of mootness:

1. The existence of a live dispute precludes treating a case as moot. *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 537-38 (1978); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 86-87, n. 1 (1977); *Super Tire Eng. Co.* v. *McCorkle*, 416 U.S. 115, 120-27 (1974); *Gilligan* v. *Morgan*, 413 U.S. 1, 5 (1973); *Powell* v. *McCormack*, 395 U.S. 486, 518 (1969). For example, a controversy is not mooted merely because of the sale of one piece of property where there is an immediate prospect that the dispute may erupt as to other property. *Linmark Associates, Inc.* v. *Township of Willingboro*, *supra*, 431 U.S. at 86-87, n.1. The controversy in the present case now involves the proceeds as much as it formerly involved the grain. It has spilled over to the proceeds.

2. Although *one* issue in a case has become moot, the case nevertheless remains alive if *other* issues have not become moot. *University of Texas* v. *Camenisch*, ____ U.S. ____, 68 L. Ed.2d 175, 179 (1981); *Powell* v. *McCormack*, *supra*, 395 U.S. at 496. The appeal in this case challenges the Eighth Circuit's judgment sustaining respondents' jurisdiction, not respondents' order for the sale of the grain. The issues differ. Since a reversal would effectively shift the sale proceeds to the state court, this case is not moot. Cf., *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 194-95 (9th Cir. 1977) (sale did not moot the issue over confirmation of a reorganiza-

tion plan because a reversal would have had "some effect on the proceedings below"); *Matter of King Resources Co.*, 651 F.2d 1326, 1332 (10th Cir. 1980).

The courts have also recognized a sharp distinction between funds belonging to the estate which a bankruptcy trustee has the right to control and those that are not a part of the estate over which state officers have the right to exercise sole control. *In re Teltronics, Ltd.*, 649 F.2d 1236, 1239 (7th Cir. 1981), Supp. Br., p. 5. It was there held that, despite a bankruptcy, jurisdiction over funds obtained by the bankrupt's fraud was vested exclusively in a state court under the control of a non-bankruptcy consumer fraud receiver.

3. Issues capable of repetition but which might otherwise evade review generally have been viewed as live. *Vitek* v. *Jones*, 445 U.S. 480, 487 (1980); *Gerstein* v. *Pugh*, 420 U.S. 103, 110 (1975); *United States Parole Com'n* v. *Geraghty*, 445 U.S. 388, 398 (1980). The jurisdictional issue in this case will no doubt arise again if not now resolved on the merits. However, if the grain sale is held to have mooted the jurisdictional issue, then all future cases could also be deemed moot and the issue never reach this Court.

4. Mootness does not exist where third parties might be unable by themselves effectively to assert their rights but which may be vindicated if the subject action is permitted to proceed. For that reason it has been held that termination of the interest of an individual plaintiff in a class action while the action is pending does not render the class claims moot; therefore, the individual plaintiff may appeal from a denial of class certification even though he has no individual interest. *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326, 337-39, *reh. denied*, 446 U.S. 947 (1980); cf., *United States Parole Com'n* v. *Geraghty, supra*, 445 U.S. at 396-97; *Sosna* v. *Iowa*, 419 U.S. 393, 402, n. 11 (1975); *Gerstein* v. *Pugh, supra*, 420 U.S. 103, 110, n. 11. See also, *Eisenstadt* v. *Baird*, 405 U.S. 438, 444-46 (1972); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 459-60 (1958); *Barrows* v. *Jackson*, 346 U.S. 249, 257, *reh. denied*, 346 U.S. 841 (1953), which apply a high threshold test for mootness.

The present case involves the assertion of rights by petitioners for two purposes. First, through their enforcement proceeding in the state court, they seek to establish reliability for the grain warehouse regulatory scheme. Second, they seek to protect the rights of a large group of grain depositors who otherwise might be economically unable to protect their own rights. The attorneys' fees incurred by a litigant could exceed the amount of the judgment he might obtain. *Deposit Guaranty Nat. Bank* v. *Roper, supra,* 445 U.S. at 338, n.9.

The policy underlying the presumption against mootness in class litigation protecting the rights of sizeable group is equally applicable to the present case. Although Missouri's enforcement proceeding was not technically a class action, its goal was substantially the same as though it were. The Missouri Department of Agriculture attempted to bring the ownership controversies into the state court so that the rights of the hundreds of grain depositors and receipt holders, Pet., p. A-51, could be effectively and economically adjudicated and the grain (or the proceeds of its sale) distributed to its rightful owners, in accordance with applicable state property law and uninfluenced by the concern for creditors of debtor warehouse companies held by those involved in bankruptcy administration.

5. Where "any relief" is possible following a reversal, mootness has been found not to exist. *Gilligan* v. *Morgan, supra,* 413 U.S. at 5; *Powell* v. *McCormack, supra,* 395 U.S. at 517-18; *Mills* v. *Green,* 159 U.S. 651, 653 (1895). In the event of a reversal here, there would be a turnover to the state court of any unsold grain and all cash proceeds from the sale of the grain. The state court would adjudicate all controversies under applicable law. Relief would be complete.

Bankruptcy courts lack super-review jurisdiction

If permitted to stand, the Eighth Circuit's decision would enable bankruptcy courts to exercise a veto power over governmental action affecting debtors in bankruptcy in furtherance of the goals of bankruptcy law and administration without regard to the purposes of police and regulatory enactments enforced by governmental entities generally. The bankruptcy courts thus would be invested with super-review powers over a

broad spectrum of actions of governmental agencies responsible for implementing important and diverse policies unrelated to creditors' rights and as to which the bankruptcy courts would not ordinarily have the experience and qualifications possessed by the state and local agencies having jurisdiction. Since governments at all levels could lose various enforcement powers against debtors because of the mere advent of bankruptcy, the implications of the Eighth Circuit's decision are far-reaching. Congress never intended to create such a massive role for the bankruptcy courts in supersession of the well-established jurisdiction of state courts "simply because an interested party is involved in a bankruptcy proceeding". *Butner* v. *United States, supra,* 440 U.S. at 54-55. State courts, bankruptcy courts and governmental units throughout the nation require this Court's guidance as to the scope of the bankruptcy courts' jurisdiction to preclude state court enforcement proceedings.

Petitioners had no obligation to seek relief from respondents

Respondents urge that certiorari be denied on the ground that petitioners did not seek relief or exhaust their remedies in the bankruptcy court before or after the Eighth Circuit's judgment was entered. Res. Br., pp. 8-12. However, petitioners' very claim has been that the bankruptcy court lacked subject matter jurisdiction under 28 U.S.C. § 1471 and that that court was therefore powerless to act in respect of grain not owned by the estate.

This Court has stated that bankruptcy courts cannot administer property that, as here, "never became a part of the bankruptcy estate". *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 136 (1962). Accord, *Callaway* v. *Benton, supra,* 336 U.S. at 142-43, 150. In addition, bankruptcy courts, as all other federal courts, have only such jurisdiction as is conferred upon them by statute. *Owen Equipment and Erection Co.* v. *Kroger,* 437 U.S. 365, 374 (1978). There is even a presumption that a federal court has no jurisdiction "unless the contrary affirmatively appears". *Grace* v. *American Central Ins. Co. of St. Louis,* 109 U.S. 278, 283 (1883).

In essence, respondents assert that their lack of subject matter jurisdiction was cured by petitioners' recent declination

to seek relief in the bankruptcy court and also by petitioners' early participation in the bankruptcy proceedings; they also urge that participation as a ground to deny review. These contentions fail for two reasons:

First, it is settled law that jurisdiction of a federal court, in this case the bankruptcy court, cannot be conferred by the consent of the parties. *American Fire & Casualty Co.* v. *Finn,* 341 U.S. 6, 17-18, n. 17 (1951). Nor can a federal court acquire jurisdiction by estoppel. *Mahoney* v. *Northwestern Bell Telephone Co.,* 377 F.2d 549 (8th Cir. 1967). Even an actual appearance and participation in the case by a party cannot confer subject matter jurisdiction that does not otherwise exist. *Rhode Island* v. *Massachusetts,* 37 U.S. 657, 719 (1838).

Second, governmental departments are entitled to the issuance of extraordinary writs against lower courts for the very purpose of confining them to the exercise of their lawful jurisdiction. Governmental officers are not required to risk contempt or submit themselves to the exercise of excessive jurisdiction in order to test the scope of a lower court's powers. *Ex Parte Republic of Peru,* 318 U.S. 578 (1943); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 111 (1964); *La Buy* v. *Howes Leather Co.,* 352 U.S 249, 259-60, *reh. denied,* 352 U.S. 1019 (1957); *In re Attorney General of United States,* 596 F.2d 58, 63-64 (2d Cir.), *cert. denied,* 444 U.S. 903 (1979).

Thus, petitioners were under no duty to seek any relief from the bankruptcy court. That court's lack of subject matter jurisdiction over all but a minute portion of the grain, coupled with the federal-state jurisdictional conflict that erupted into confrontations between barricading farmers and United States Marshals, Pet., p. A-5; Res. Br., pp. 5-6, made this case an appropriate one for determination in a prohibition proceeding and makes it alive for review now.

Respondents failed to address 28 U.S.C. § 1471

Respondents failed to address petitioners' principal substantive contention that the bankruptcy courts lack subject matter jurisdiction under 28 U.S.C. § 1471—the basic provision conferring jurisdiction on the bankruptcy courts—to bar state court enforcement proceedings. In effect, by arguing that a reversal would "avail petitioners of nothing" because of Bank-

ruptcy Code § 105(a)'s provision authorizing bankruptcy courts to "issue any order . . . that is necessary or appropriate to carry out the provisions of" title 11 of the United States Code, respondents underscore the fact that they have failed to address the basic jurisdictional question. Section 105(a) does not confer any subject matter jurisdiction as such and thus does not advance respondents' position. If it should be determined that the bankruptcy courts are without jurisdiction under 28 U.S.C. § 1471, then they would be powerless to issue any order under § 105(a). In short, § 105(a) is a source of power only in a case in which a bankruptcy court otherwise has jurisdiction. For this reason, the authorities cited at pages 20-21 of respondents' brief are inapposite. Respondents' claim that the bankruptcy court "clearly has jurisdiction over all the *debtors'* property under § 1471" (Italics added) has no application because it fails to deal with the fact that virtually none of the grain was ever the property of the debtors. This case for a writ of prohibition is a live and important controversy.

CONCLUSION

For the reasons set forth above and in their Petition and supplemental brief previously filed with this Court, petitioners respectfully request that this Court issue a writ of certiorari and reverse the Eighth Circuit's judgment.

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Respondents.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-79

IN RE STATE OF MISSOURI, et al.,

Petitioners,

—v.—

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS and the HONORABLE CHARLES W. BAKER, et al.,

Respondents.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES

The brief for the United States, just as the Eighth Circuit's decision, is predicated on two incorrect assumptions: first, that state court proceedings under the Missouri grain law constitute "insolvency" proceedings; and second, that federal bankruptcy actions preempt state "insolvency" proceedings.

Those assumptions are shattered by almost two centuries of case law beginning with the seminal opinion of Chief Justice Marshall in *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) where he stated that while Congress "possesses the power of enacting bankrupt laws, . . . the states [have] the power of enacting insolvent laws." 17 U.S. at 194.

The contentions of the United States and the Eighth Circuit's decision are in conflict with time-honored decisions of this Court establishing (1) that state proceedings, such as those under the Missouri grain law, are not "insolvency" proceedings, and (2) that "insolvency" proceedings, unlike "bank-

ruptcy" proceedings that provide for the *discharge* of the debtor, are not preempted by federal bankruptcy. They also incorrectly assert that under Bankruptcy Code § 541(a)(1) and 28 U.S.C. § 1471(e) the bankruptcy court had jurisdiction over all of the subject grain, claiming it was part of the "estates" of the debtors as of the commencement of these bankruptcy cases even though the debtors then had neither possession of the grain nor a right to use or enjoy it. However, the United States joins petitioners in rejecting the Eighth Circuit's holding, 647 F.2d at 776, that state court proceedings that are otherwise immune from federal bankruptcy are superseded by the federal proceedings if they relate to the protection of *pecuniary* interests. U.S. Br., p. 12, n.5.*

1. Neither the briefs for the United States or respondents, nor the Eighth Circuit's opinion, mentions the distinction between "bankruptcy" and "insolvency" proceedings made at the 1819 Term in *Sturges* v. *Crowninshield*, a distinction that serves as the cornerstone of the constitutional immunity of state "insolvency" and other non-bankruptcy proceedings from federal bankruptcy preemption. This Court there stated that *Congress*' power under the Bankruptcy Clause of the Constitution, Article I, Section 8, Clause 4, only encompassed the power to enact laws on the subject of "bankruptcies", and that the *states* had the power to enact "insolvency" laws. The Eighth Circuit assumed that Missouri's proceedings were "insolvency" proceedings. It then overlooked this basic distinction and held that as "insolvency" proceedings, Missouri's actions were preempted by federal bankruptcy. The United States agrees with these defective positions. U.S. Br., pp. 9, 11.

In essence, as established in *Sturges* v. *Crowninshield*, *supra*, 17 U.S. at 194, and as stated in many decisions during the ensuing century, a critical ingredient of a "bankruptcy" law is a *discharge* of the debtor that frees his after-acquired assets from his prior debts. *Mayer* v. *Hellman*, 91 U.S. 496 (1876); *Boese* v. *King*, 108 U.S. 379, 386-87 (1883); *Stellwagen* v. *Clum*, 245 U.S. 605, 615-17 (1918); *International Shoe Company* v.

* "U.S. Br." refers to the Brief for the United States in Opposition filed on or about December 14, 1981. "Pet." refers to the Petition for a writ of certiorari.

Pinkus, 278 U.S. 261, 264-65 (1929); *Straton* v. *New*, 283 U.S. 318, 327-28 (1931); *Pobreslo* v. *Joseph M. Boyd Company*, 287 U.S. 518, 523-24 (1933).

"Insolvency" laws, on the other hand, while dealing in various ways with debtors and their creditors, do not by discharge provide the debtor with the fresh start that is an essential element of a "bankruptcy" law. This distinction between the two types of laws was underscored at the 1827 Term in *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213 (1827). There, the Court stated that in operation, a "bankrupt" law "is to discharge the debtor absolutely." 25 U.S. at 302.

2. In actuality, the Missouri proceedings were neither "bankruptcy" nor "insolvency" proceedings. "Insolvency" proceedings not only do not grant a discharge, but must deal in some way with debtors and their creditors and at least bring about the liquidation of a *debtor's* assets and distribution to its creditors. Thus, a receivership for distribution of a debtor's property to his creditors may be an "insolvency" proceeding. *Stellwagen* v. *Clum*, *supra*, 245 U.S. at 613. On the other hand, assignments by debtors under state statutes of all of their assets for liquidation and distribution to the creditors, but which do not grant a discharge, may not be "insolvency" proceedings, although they may be attacked as preferences by the timely filing of a federal bankruptcy case against the assignor. *Mayer* v. *Hellman*, 91 U.S. 496, 503.

Missouri's grain law proceedings do not provide a discharge to the debtor warehouseman, nor do they wind up the debtor's business or distribute his assets to his creditors. Those proceedings merely authorize distribution of the stored grain to its *owners*. Proceedings under Missouri's grain laws affect only the owners of grain, i.e. hundreds of farmer-depositors, Pet. A-51, but do not involve any material interest in property of the debtors' § 541 estates. They were not "insolvency" proceedings.

Missouri's proceedings are triggered by various danger signals, such as the warehouseman's inability to satisfy depositors' grain claims or the warehouseman's insolvency, RsMo § 411.519.6, or a grain shortage, RsMo § 411.519.1 and .2. The statutory designation of a warehouseman's insolvency as a "trigger" does not transform Missouri's proceedings into "in-

solvency" proceedings for winding up the warehouseman's business to benefit his creditors. They retain their essential police power character to accomplish the grain law goals of protecting grain owners and the integrity of the grain industry.

3. Dominion and control over more than $5 million of grain here involved was voluntarily turned over to the Missouri authorities by the debtors on August 8, 1980, *prior* to filing their bankruptcy. The state authorities had possession on August 11, 1980, the date bankruptcy was filed. The grain therefore was not part of the debtors' "estate" created pursuant to § 541(a)(1). The United States has acknowledged that before commencement of these bankruptcy cases, the debtors authorized the Missouri authorities to assume control of their Missouri grain warehouses. U.S. Br., p. 5, n.2.* The Eighth Circuit also acknowledged that the debtors turned over such control *prior* to bankruptcy. 647 F.2d at 771. Nevertheless, the Eighth Circuit ruled that *in the absence of any state court order* on the date of Bankruptcy interfering with the debtors' right to possession, the debtors rather than Missouri would be treated as if they had a possessory interest in all of the grain on the date they filed their bankruptcy cases. 647 F.2d at 774, n.12 and text at n.12. In actuality, the Missouri authorities had possession prior to and on the date of the commencement of the bankruptcy cases. Pet. A-46, para. 7 and Pet. A-48, para. 15(a).

The existence of a possessory interest in the debtors was essential to the Eighth Circuit's analysis for two reasons: first, that court tried to prop up its unprecedented notion that there was "preliminary jurisdiction." To do so it fashioned a fictitious foundation consisting of a non-existent possessory interest. 647 F.2d at 774. Secondly, both the Eighth Circuit and the United States rely on § 541(a)(1) of the Bankruptcy Code that defines "property of the estate." That statute expressly includes as property of the estate only interests of the debtor in property "as of the commencement of the [bankruptcy] case." Without finding possession of the grain in the debtors *at that*

* Nevertheless, by inconsistent statement not supported by record citations, the United States erroneously states that the debtors had possession of the grain when they filed bankruptcy. U.S.Br., pp. 9 and 16.

date, the § 541 debtors' estate, otherwise possessing only a "minute" interest, could not be said to include the vast quantity of grain in issue. There thus would have been no basis under the language of 28 U.S.C. § 1471(e) or otherwise for an exercise of bankruptcy court jurisdiction over virtually all of the grain. Thus, absent actual possession by the debtors *on the date they filed bankruptcy*, there was no basis for concluding that the grain became part of the estate. Since the grain was not so possessed, it was not "property of the estate," and the bankruptcy court therefore lacked jurisdiction.

Tested by both the language and intent of § 541 of the Bankruptcy Code and 28 U.S.C. § 1471(e), its jurisdictional counterpart containing similar phraseology, the asserted conflict between state court proceedings under the Missouri grain law and the federal bankruptcy cases, evaporates. The state and federal proceedings were compatible. Each proceeding deals with *different* property—in one case the debtors', and in the other, the grain owners'. "Minute" interests and non-existent "possession" cannot move the $5 million of grain subject to the state proceedings into the category of "property of the estate" or "property of the debtor" at the date of bankruptcy. Indeed, there was never any real ownership or possessory interest of these estates in the grain. The Eighth Circuit even noted that "the trustee . . . presented no documents of title to substantiate his claim of ownership." 647 F.2d at 774. Thus, by judicial fiat, non-existent possession of the debtors at the date of bankruptcy was decreed to satisfy the requirement of actual possession mandated by the statute as the jurisdictional base.

4. In the present case, the jurisdiction of the Missouri state courts extended to all grain *not* owned by the debtors. The debtors merely owned 2.3% of the grain. 647 F.2d at 774. There was no dispute over the debtors' right to retain that "minute" portion of the grain. The purpose of the Missouri proceedings was to return close to 98% or roughly $5 million worth of grain to its hundreds of rightful owners. Those proceedings had nothing to do with the debtors as such or the claims of their creditors. Nor could those proceedings discharge the debtors from liability to their creditors. Missouri's proceedings thus were not "insolvency" proceedings in any sense.

Missouri's proceedings could not dispose of any property of the estates. But even if they could, they still would not be "insolvency" proceedings. It has been stated that "state laws which provide for sale and distribution of a debtor's property may not amount to insolvency laws." *Straton* v. *New*, *supra*, 283 U.S. at 327. This Court there ruled that the burden is on the party claiming that a state proceeding is an "insolvency" proceeding to establish that it is. Thus, the party making the assertion "must therefore show that the statutory action in the state court is, in fact, an insolvency proceeding." *Straton* v. *New*, *supra*, 283 U.S. at 327-28. No such showing has been made here. The United States and the Eighth Circuit merely assumed that they were "insolvency" proceedings.

5. Proceedings under state grain laws are not incompatible with bankruptcy proceedings of a warehouseman. The determination of the ownership of grain as among a large number of grain depositors has nothing to do with (a) any bankruptcy or insolvency proceedings of a debtor-warehouse company, (b) the distribution to creditors of such a debtor of the proceeds of the property actually included in the estate, such as the debtor's equipment or real estate, (c) adjudicating the allowance or disallowance of the claims of creditors of such a debtor, or (d) the discharge of such a debtor. Such state proceedings in reality have nothing to do with the purposes of a federal bankruptcy proceeding of a warehouseman or any other type of debtor.

The United States argues that a bankruptcy court would be crippled if its jurisdiction did not extend to "all of the property of the estate," relying on Congressional history. U.S. Br., pp. 9-10, n.4. Its argument, however, is a non-sequitur. No one disputes that in general the bankruptcy courts may exercise jurisdiction over property of the estate. The weakness in the contention of the United States is its endorsement of the unsupportable analysis of the Eighth Circuit (1) treating property not owned by the estates and in which they had no possessory interest entitling them to use or enjoy it, as if it were property of the estate and (2) treating property in the possession of the Missouri authorities on the date of bankruptcy as if the debtors themselves then had possession of it.

Neither any demonstrated impact of the state proceedings on the federal bankruptcy proceedings nor any statute or case law supports the broad reading of the statutes regarding the bankruptcy courts' jurisdiction for which the United States contends. No precedent or policy has been advanced to extend the jurisdiction of bankruptcy courts to enormous quantities of property *not* owned by the debtors. The United States erroneously argues that "only the bankruptcy court was authorized by Congress to determine these competing [ownership] claims" among third parties. U.S. Br., p. 11. No support has been offered for its *ipse dixit* that state court jurisdiction over such claims would interfere with the orderly administration of the bankruptcy. Moreover, any ownership disputes are among third parties. Under applicable case law, such disputes belong in the state courts. Supp. Br. dated August 12, 1981, p. 10; *accord*, *Matter of Emergency Beacon Corporation*, Slip Op. p. 5387, at 5389, n.1 (2d Cir. November 23, 1981).

6. The lower court read § 541 as including in "property of the estate" grain delivered for storage to a warehouse debtor. Because the Congressional history of § 541 indicates that "a possessory interest or leasehold interest" would constitute property of the estate, the Eighth Circuit ruled, 647 F.2d at 774, and the United States now argues, U.S. Br., p. 9, that *bare possession* of property concededly deposited for storage is, without more, a "possessory interest" included in the § 541 estate. However, bare possession by a mere bailee, without an associated right of use or enjoyment of the property, is not sufficient to elevate naked possession to the level of a "possessory interest" of the type included in the § 541 estate. A bailee has no right of use akin to the possessory interest enjoyed by a debtor-lessee under a lease, and is more like a mere stakeholder. Moreover, the Congressional history of § 541 makes clear that not all property possessed by a debtor automatically becomes part of his § 541 estate. For example, property held by a debtor under a constructive trust is not included. H.Rep. No. 95-595, p. 368. No sound reason has been advanced for treating as property of the estate property that is neither owned by the estate nor dedicated to its use or enjoyment. The lower

court's analysis, and the United States' argument, regarding § 541 is erroneous.

7. The brief of the United States, as the decision below, advances § 105(a) of the Bankruptcy Code to bootstrap its conclusion that the bankruptcy proceedings preempted the state court proceedings. See U.S. Br., p. 14 and 647 F.2d at 776. However, § 105 merely confers authority on a bankruptcy court to issue orders, process or judgments as "necessary or appropriate to carry out the provisions" of the Bankruptcy Code. Since the debtors lacked any ownership or other interest sufficient to bring almost 98% of the grain within their estates, it was neither necessary nor appropriate for the bankruptcy court to issue any order enjoining the Missouri state court proceedings in order to carry out the provisions of the Bankruptcy Code. In short, jurisdiction could not be created or expanded by § 105(a).

8. The United States, echoing respondents and the Eighth Circuit, relies on *Re Watts*, 190 U.S. 1, 27 (1903). U.S. Br., p. 9. In *Straton* v. *New*, *supra*, 283 U.S. at 331, this Court narrowed *Re Watts* on the basis of a statement in *Re Watts* that a bankruptcy proceeding may displace the state court proceedings only if the state proceedings took the form "of winding up the affairs of the insolvent corporation." 283 U.S. at 331. Missouri's proceedings were not to wind up the debtors' affairs. *Re Watts* is inapposite.

Isaacs v. *Hobbs Tie & Timber Company*, 282 U.S. 734, 737-38 (1931), relied on in concert by respondents, the United States and the Eight Circuit, also has nothing to do with this case. *Isaacs* merely held that since a court of bankruptcy "has exclusive jurisdiction to deal with the property of the bankruptcy estate," a state foreclosure court should not interfere with such jurisdiction by further proceedings for foreclosure. 282 U.S. at 737. The predicate of that case was jurisdiction over "property of the bankrupt estate." As shown above, virtually none of the grain was "property of the estate" under § 541. *Perez* v. *Campbell*, 402 U.S. 637 (1971), is even further afield. It ruled that state statutes that "interfere with" federal statutes are invalid under the Supremacy Clause. The state statute there involved withheld a discharge that would have

been available under the Bankruptcy Act. The inconsistency was obvious. No inconsistency exists in the present case; it has only been assumed.

9. Faced with intimidation by respondents, threats of force by the United States marshalls, and contempt proceedings noticed personally by the bankruptcy judge, petitioners were under no duty concurrently to seek relief from respondents themselves. Case law sanctioned the initiation by state governmental officials of proceedings for a writ of prohibition to confine the bankruptcy court to its lawful jurisdiction. Supp. Br. dated August 12, 1981, p. 1, n.* Petitioners were not required first to subject themselves to prosecution for contempt and likely punishment by a bankruptcy judge who aggressively undertook contempt proceedings against officials of the State of Missouri, 647 F.2d at 773, and then to take an appeal "if dissatisfied with the result." 647 F.2d at 779. In an extraordinary case such as this, state officials are not required to risk jail sentences for criminal contempt in order to obtain judicial relief confining an inferior federal court to its lawful jurisdiction. The United States echoes the claim that an appeal was available. U.S. Br., p. 15. However, no case it cites would opt for appeal rather than an extraordinary writ in these circumstances. Pet. A-57.

Feelings ran high among the hundreds of farmer-depositors in Missouri. The climate was tense and dangerous because of the bankruptcy court's order requiring various farmer-depositors to sell new grain to the bankruptcy trustee, while they were told at the same time that they could not get possession from the trustee of their own previously deposited grain. 647 F.2d at 772, n.7. Tension escalated even more when the bankruptcy court called out United States marshalls to break the farmers' blockade. 647 F.2d at 772, n.7. Bloodshed was a risk. Had Missouri's authorities submitted to the disputed jurisdiction of the bankruptcy court and then sought relief on appeal from adverse rulings, the likelihood of force and bloodshed would have increased because of the open hostility of the farmer-depositors to the bankruptcy authorities. Missouri's proceedings for writs of prohibition, on the other hand, tended to dissipate

that hostility. The circumstances of this case were extraordinary.

The cases relied on by the United States to deny extraordinary relief are either inapposite or support petitioners. For example, *Parr* v. *United States*, 351 U.S. 513, 520, (1957), U.S. Br., p. 14, actually sanctioned a writ where, as here, "a court has exceeded . . . its jurisdiction." 351 U.S. at 520. In *Ex parte The City Bank of New Orleans* (cited by the United States as *Ex parte Christie*) 44 U.S. (3 How.) 292, 308-322 (1845), it was merely ruled that a court of bankruptcy had jurisdiction to determine creditor claims, the function there challenged. 44 U.S. at 320. That case thus has no bearing on this one. Nor does *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86 (1970) bear on the present case. There, the petitioners had other available legal means that were adequate. Further, the bankruptcy court's lack of jurisdiction could not be cured by waiver, estoppel, inaction or otherwise. Reply brief dated September 14, 1981, pp. 8-9.

CONCLUSION

For the reasons stated above, in their petition, and in their prior briefs dated August 12, 1981, September 14, 1981 and December 3, 1981, petitioners respectfully request that this Court issue a writ of certiorari and reverse the Eighth Circuit's judgment.

Respectfully submitted,

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Respondents.

RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

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Respondents.

RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

Petitioners request that the Court strike respondents' supplemental brief on two independent grounds.* First, that 19-page brief exceeds the limit fixed by Rule 22 for supplemental and reply briefs. Secondly, despite the absence of a single reference in their supplemental brief to the appendices accompanying the petition and their own brief in opposition dated August 10, 1981, major portions of respondents' supplemental brief consist of their own version of the "facts" not supported either by any references to the record or by any documents included in the appendices. Respondents thus rely on undocumented recent developments in these Chapter 11 cases purportedly occurring even after the Eighth Circuit's decision was rendered, and also on events that may first unfold in the future—i.e., efforts by the bankruptcy trustee and others over "the last year in negotiating, drafting, preparing, and finalizing Trustee's Joint

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* Respondents' supplemental brief in opposition was received by petitioners' counsel by mail on January 4, 1982. "Res. Supp. Br." refers to that supplemental brief in opposition.

Plan of Reorganization," and its possible future confirmation. Res. Supp. Br., pp. 5, 15. Alternatively, in the event respondents' supplemental brief is not stricken, it is requested that the Court consider petitioners' responses set forth below.

The extraordinary circumstances posed by the present case are evident from the detailed description of this very litigation by the United States Senate Committee on the Judiciary contained in its Report dated July 27, 1981, No. 97-168 accompanying S.1365. S.1365 appears to be the bill to which respondents allude in their recent brief. Res. Supp. Br., pp. 16-17. That bill, while passed by the Senate, has enjoyed no progress in the House of Representatives and there appears to be no indication of any action by the Congress looking towards its enactment. S. Rep. No. 97-168 is nevertheless important because of its findings about the facts of this case.

In its Report, the Senate Committee specifically found (1) that the Missouri authorities took possession and control of the subject five Missouri warehouses on August 8, 1980, prior to the filing of the bankruptcy cases; (2) that for the most part, there was enough grain on hand at each of the warehouses to meet the outstanding receipts; (3) that Missouri's actions on August 12, 1980, the day after bankruptcy was filed, were to insure delivery of the stored grain to the warehouse receipt holders as rightful owners; (4) that the blockade by farmer-depositors of one of the warehouses resulted from their being required to sell additional grain to the trustee, who concurrently refused to release their stored grain to them; (5) that after United States Marshals appeared at the warehouse premises in force, the Missouri authorities involuntarily surrendered possession to the trustee on September 17, 1980 and that Missouri's surrender was only because the Missouri authorities were threatened with contempt by the bankruptcy court; (6) that the bankruptcy trustee alleged that he owned the grain, which claim was, in the view of the Missouri authorities, inconsistent with the provisions of the Missouri grain laws because the trustee admittedly held no documents of title; and (7) that the October 20, 1980 enforcement action in the state court was instituted by the State of Missouri to preserve the integrity of its grain laws. These facts, as found by the Senate Committee, are consistent with those alleged in petitioners'

petition for a writ of prohibition. Respondents' undocumented narration of the "facts" in their supplemental brief cannot withstand the uncontradicted allegations in that petition, Pet. A-46, para. 7 and A-48, para. 15(a), as fully corroborated by the extensive findings made by the Senate Committee on the Judiciary. Since enactment of S.1365 is doubtful, the bill does not by itself offer any prospect of resolving the jurisdictional issues posed by this case. Certiorari is thus necessary to resolve these problems.

Respondents candidly recognize that unless the grain constituted "property of the estate", there would have been no basis for the determination below that the bankruptcy court had subject matter jurisdiction over it. Res. Supp. Br., pp. 2, 3, 7, 8. Moreover, unless the grain also constituted property of the estate *as of the date of bankruptcy*, August 11, 1980, the grain could not have become part of the debtors' estates created by § 541 of the Bankruptcy Code. In addition, unless the debtors owned all of the grain "as of the commencement of such [bankruptcy] case", none of the grain would have been within the subject matter jurisdiction of the bankruptcy court as established by 28 U.S.C. § 1471(e).

Respondents now attempt to meet these jurisdictional requirements by the bald claim that the trustee "had actual exclusive possession of all Missouri grain . . . as of the date of the filing of the voluntary Chapter 7 petitions on August 11, 1980." Res. Supp. Br., pp. 1-2. However, they cite no factual basis for their statement. Moreover, their statement is contrary to the record as well as the findings of the Senate Committee.* Further, although the court below treated the debtors as if they had a possessory interest in the grain on the date of bankruptcy because of the absence of any *state court order* interfering with

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* In addition, respondents previously acknowledged that prior to bankruptcy, specifically on August 8, 1980 (erroneously referred to by respondents as of August 8, 1981), the debtors delivered to petitioners "documents purporting to surrender possession and custody of the Missouri elevators to petitioners." Respondents August 10, 1981 Brief in Opposition, p. 3. The Eighth Circuit itself acknowledged that "[t]hree days prior to the filing of the bankruptcy proceedings, the debtors authorized the Missouri Department of Agriculture to assume control of the grain in their Missouri warehouses." *State of Missouri* v. *U.S. Bankruptcy Court*, 647 F.2d 768, 771 (8th Cir. 1981).

the debtors' supposed right to possession, 647 F.2d at 774, n.12, its analysis had no factual support. See, petitioners' reply dated December 23, 1981, p. 4. Indeed, nothing in the record lends any credence to respondents' claim that the debtors had possession on the date of bankruptcy. Contrariwise, the record establishes by uncontroverted documents that the Missouri authorities had sole possession prior to the date these bankruptcy cases were commenced, Pet. A-46, para. 7; Pet. A-48, para. 15(a), which is corroborated by the Senate Committee's findings. Respondents point to nothing as a cure for the lack of possession precluding a finding of jurisdiction.

Even if respondents or the debtors had had possession, their claim that mere possession was sufficient to create subject matter jurisdiction in the bankruptcy courts must fail. There could be no "property of the estate" within the meaning of § 541 of the Bankruptcy Code by reason of a debtor's possession of property as a *mere bailee*. Here, the grain admittedly was deposited for storage with the debtors as bailees. Naked possession under a bailment for storage does not elevate the possessory interest to the level contemplated by Congress as necessary to create § 541 property of the estate. Section 541 could not be read otherwise with with respect to stored property in which the bailee had no right of use or enjoyment. Petitioners' reply dated December 23, 1981, p. 7.

Elaborate financial analyses are advanced by respondents in their effort to create the impression that the estates have a substantial financial interest in this grain. Res. Supp. Br., pp. 3-5. In essence, respondents claim unpaid storage charges, as well as post-petition fees, interest and expenses they attribute to the Missouri grain, aggregating approximately $1,537,000. The reality is that no factual basis can be found in the record to support these claims, most of which first arose only after petitioners' prohibition petition was filed in the district court and some of which arose as recently as two months ago, or even later. Moreover the argument based on these expenses is a bootstrap contention. If the grain is not property of the estate, there would be no legal basis to make these charges. The charges thus cannot serve to create a claim of the trustee against the grain. In the absence of such a claim, neither the trustee nor the debtors would have any interest in the grain.

Respondents' reasoning is circular. Finally, since these expense claims arose after the bankruptcy cases were commenced they could not exist as of the earlier crucial date required by both 28 U.S.C. § 1471 and Code § 541.

Respondents' reliance on § 506(c) of the Bankruptcy Code as a predicate for these costs and expenses is misplaced. Section 506(c) merely permits a charge by a bankruptcy trustee against "property securing an allowed secured claim" for the costs of preserving such property. Thus, the statute only permits such a charge against property which constitutes *collateral* for a claim of a *secured creditor.* Here, virtually all of the grain was owned by third parties. Section 506(c) does not authorize any charge against the *owner* of property. Section 506(c) thus has no relevance to this case.

Respondents' attempts to downgrade the importance of the admitted fact that "no documents of title" were presented by the bankruptcy trustee to substantiate his unfounded claim of ownership. 647 F.2d at 774. Respondents thus advance a section of the Missouri grain law as a predicate for their claim that there was "an overage position" that vested some grain ownership in the debtors. These "facts", however, are not in the record. The record is clear that 2.3% of the grain is what was owned by the debtors. That minute quantity was never in dispute, whereas the estates never had any bona fide interest in the vast bulk of the grain.

Respondents now offer for the first time an unfiled plan of reorganization as a foundation for subject matter jurisdiction. Res. Supp. Br., pp. 5-6. That plan too is not part of the record. Not only do respondents claim that this non-existent, unfiled and unidentified plan presently creates jurisdiction, but they even seem to claim it as a basis for the existence of jurisdiction at the much earlier, crucial date of bankruptcy, August 11, 1980, even though no claim has been made by respondents that this jurisdiction-generating plan of reorganization was in gestation at that early date. Thus, respondents' supplemental brief refers to a "joint plan of reorganization" that may be filed in the future by the trustee in these Chapter 11 cases. They claim that if that yet-to-be-filed plan should hereafter be confirmed by the bankruptcy court, "all disputes relative to the . . . grain will be resolved." On the other hand, the trustee prophetizes

that if his would-be plan is not confirmed, then controversies about the grain "will have to be resolved by whatever court or courts of competent jurisdiction are finally determined to have subject matter jurisdiction over the Missouri grain sale proceeds." Res. Supp. Br., p. 5. Respondents' position is ludicrous. Surely an unfiled and unknown plan that is not even part of the record cannot presently serve to create subject matter jurisdiction as of the date of bankruptcy in the event it is subsequently confirmed, and also presently to create jurisdiction pending its possible filing and confirmation at some unidentified future time. Nothing but tricks or fiction can turn this grain into property of the estate or otherwise create jurisdiction over it.

Respondents' claim that these estates really had a property interest in the grain is belied by the Eighth Circuit's finding that "[t]he trustee, however, has presented no documents of title to substantiate his claim of ownership." 647 F.2d at 774. In view of that lack of documentation, the bankruptcy trustee's "ownership" litigation based on his undocumented claim in essence seeks to enlarge the estate either by effecting some recovery before the bankruptcy court or by obtaining a settlement from the true owners of the grain. Success would presumably be rewarded by fee allowances, and the creditors would also benefit. The losers would be the grain owners, the very class to be protected by the state grain laws.

Respondents have equivocated. They merely say that it "appears" that some warehouse receipts may not comply with Missouri law; that it "appears" that some farmers caused title to pass; that "it also appears that the trustee has title to other quantities of Missouri grain"; that there are "difficult questions of law and fact requiring much testimony"; and that the "trustee anticipates that as a result of such complex litigation, if necessary, [estimated by the trustee at 12 weeks or more], the debtors' ownership interests in the Missouri grain will increase substantially." Res. Supp. Br. pp. 5-6. In essence, all that respondents assert in their recent brief is a series of equivocal statements supported by "no documents of title", 647 F.2d at 774, and unsupported by anything in the record. Nor is respondents' rhetoric shored up by their reliance on Grain Storage Agreements apparently made with Commodity Credit

Corporation "for long-term grain storage" or by the "storage contracts with individual Missouri and Arkansas farmers." Res. Supp. Br., p. 3. The very existence of these various storage agreements actually demonstrates the lack of any property interest on the part of the debtors at the crucial date of bankruptcy because they show that the debtors had no right to use or enjoy the grain.

Reliance by respondents on §§ 542 and 543 of the Bankruptcy Code is also misplaced. Each of those statutes is limited in operation and effect to "property of the estate". Thus, § 542, dealing with the turnover of property to the estate, refers to property that the trustee may use, sell or lease under § 363 of the Bankruptcy Code. Section 363, in turn, in subdivisions (b) and (c), is explicitly limited in scope to "property of the estate". The other statute, § 543, also applies only to "property of the estate". The weakness of respondents' position lies in the fact that they *assume* that the grain somehow became "property of the estate" through the operation of §§ 542 and 543. But since those sections, by their terms, only operate with respect to "property of the estate", their argument does nothing more than beg the question. See, Res. Supp. Br., p. 2. Further, respondents' contention based on § 363(f)(4) of the Bankruptcy Code is another *non sequitur.* As recognized by respondents themselves, § 363(f) merely authorizes a sale by a trustee under either subsection (b) or (c) of § 363. Res. Supp. Br., p. 7. Those subsections, in turn, are limited in their operation and effect to "property of the estate". Therefore, § 363(f) cannot serve as a basis for finding that the grain is "property of the estate".

The grant of broad subject matter jurisdiction to the bankruptcy courts by 28 U.S.C. § 147[illegible]rged by respondents as a basis for finding subject matter jurisdiction over grain that was not property of the estate or of the debtor "as of the commencement of such [bankruptcy] case", as required by that statute. However, no one has asserted that the enlarged jurisdiction of the bankruptcy courts is universal. This case exemplifies that there are limits. Respondents, moreover, have incorrectly described the bankruptcy court created by the 1978 legislation "as an adjunct of the district court." Res. Supp. Br., p. 7. Although characterized as an "adjunct" by 28 U.S.C.

§ 151, enacted by § 201(a) of Public Law 95-598, § 201(a) does not take effect until April 1, 1984 by virtue of § 402(b) of that statute. The controlling section is § 404(a) of Public Law 95-598. It provides that during the transition period ending on March 31, 1984, the courts of bankruptcy created by § 2a of the Bankruptcy Act shall constitute "a separate department" of the district court. The lesser status accorded the courts of bankruptcy as *departments* during the transition period as compared with their *adjunct* status during the post-1984 period, thus gives rise to doubt as to Congressional intent as to the scope of the jurisdiction of the bankruptcy courts during the transition period. Indeed, the statutes on which respondents rely contemplate that jurisdiction will be founded on "property of the estate" as set forth in 28 U.S.C. § 1471 and §§ 363 and 541 of the Bankruptcy Code, or on the need to carry out the provisions of title 11, as set forth in § 105 of the Bankruptcy Code. Further, 28 U.S.C. § 1481 does not by its language, and was not intended by Congress to, enable courts of bankruptcy to determine the fate of property not constituting "property of the estate". The enlarged jurisdiction contemplated by 28 U.S.C. § 1471 was not intended to be all-inclusive as urged by respondents. H. Rep. No. 95-595, pp. 445-46; S. Rep. No. 95-989, pp. 153-54.

Respondents claim that a petition for a writ of prohibition should be denied on the authority of *In re Chicago, Rock Island & Pacific Railway Company*, 255 U.S. 273 (1921). Res. Supp. Br., pp. 12-13. It was there held that an extraordinary writ should not be issued against a district court merely because it might hold a special appearance by the petitioner to be a general appearance. Obviously, as stated in the decision, since the petitioner "will have its remedy by appeal", there was no need for an extraordinary writ. 255 U.S. at 280. The present case is vastly different. Here, petitioners are a sovereign state and its officials. Bloodshed was a risk. The grain owners felt aggrieved by the trustee's refusal to release possession of their grain to them, while at the same time requiring them to sell additional grain to the trustee. The farmers blockaded a warehouse. The trustee demanded possession from petitioners.

Respondents invoked the federal marshals. Petitioners were threatened with contempt. Petitioners decided not to acquiesce in respondents' exercise of asserted jurisdiction that petitioners believed in good faith to be beyond respondents' powers.

The circumstances were extraordinary. The petition sought to confine the court of bankruptcy to its lawful jurisdiction only after the bankruptcy trustee, without basis, asserted ownership of all of the grain. This blatant attempt to gain ownership of the grain for the debtor estates and their creditors lacked supporting documentation. Public danger resulted from the bankruptcy trustee's positions and actions. These circumstances brought this case within the principle warranting the issuance of a writ of prohibition in favor of a government or public officials so as to confine an inferior court to its lawful jurisdiction and to enable public officials to test the power of a court without risking serious sanctions, including possible jail sentences, for contempt of the inferior court.

Respondents now retreat from their earlier position that the federal bankruptcy laws supersede state receivership proceedings. Compare, respondents' Brief in Opposition, p. 18 with Res. Supp. Br., p. 10. Respondents thus chose not to respond to the analysis contained in petitioners' reply dated December 23, 1981 based on *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). Although respondents still contend that the Missouri grain laws provide for "involvency" proceedings, they no longer claim that such proceedings are "bankruptcy" proceedings. Since the Bankruptcy Clause of the Constitution merely empowers Congress to legislate on the subject of "bankruptcies", state grain law proceedings, even if they are "insolvency" proceedings, are not superseded or overruled.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari.

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